***United States Court of Appeals***

***for the Second Circuit***




# APPELLANT'S APPENDIX

# 74-1749

ORIGINAL

B
P/s

In The

# United States Court of Appeals

For The Second Circuit

IRVING GORDON,

*Appellant,*

*vs.*

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD, and PHILIPS, APPEL & WALDEN, INC., (sued herein as PHILLIPS, APPEL & WALDEN),

*Appellees.*

*On Appeal from the Untied States District Court for the Southern District of New York.*

## APPELLANT'S APPENDIX

LEONARD LOEWINTHAN
*Attorney for Appellant*
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New York, New York 10022
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UNITED STATES COURT OF APPEALS
FILED
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CIVIL DOCKET
UNITED STATES DISTRICT COURT

DOCKET ENTRIES

JUDGE BAUMAN

Jury demand date:

71 CIV. 1285

. Form No. 106 Rev.

| TITLE OF CASE | ATTORNEYS |
|---|---|
| IRVING GORDON<br><br>AGAINST.<br><br>ROBERT L. BURR,<br>ELPAC, INC.<br>ARNOLD LORD, AND PHILLIPS,<br>APPEL & WALDEN | For plaintiff:<br>LEONARD LOEWINTHAN<br>One East 57th St.<br>N.Y.C.N.Y. 10022<br><br>For defendant:<br>BALTERMAN & GEIST<br>10 East 40th St.<br>New York 10016 (deft Elpac Inc.)<br>xRogersx&xCoopersxfxrxBrbaxkxkxBurrx<br>ROGERS & COOPER<br>60 East 42 St.<br>New York 10017 (Robert L. Burr)<br>~~Schulman & Gasarch (for Phillips, Appel & Walden Inc. and Lord)~~<br>~~90 Broad St. NY 10004 WH 3-6127~~<br>BRESSLER, MEISLIN, TAUBER, LIPSITZ<br>90 BROAD STREET<br>NEW YORK, N.Y. 10004 (FOR PHILIPSAAPP) |

| STATISTICAL RECORD | COSTS | | | DATE | NAME OR RECEIPT NO. | REC. | | DISB. | |
|---|---|---|---|---|---|---|---|---|---|
| S. 5 mailed X | Clerk | | | 3-19-71 | L LOEWENTHAN | 15 | | | |
| | | | | 3-25-71 | U.S. TREAS | | | 15 | - |
| S. 6 mailed ✓ | Marshal | | | [illegible] | Loewenthan | 5 | - | | |
| | | | | [illegible] | Treas | | | 5 | - |
| asis of Action: | Docket fee | | | [illegible] | Bress Lek | 1 | - | | |
| VIOL. S.E.C. ACT. 1934 | | | | [illegible] | Phillips | | | 5 | - |
| 45,000 | Witness fees | | | [illegible] | Burr-Pelc | 5 | - | | |
| | | | | [illegible] | Miller | | | 5 | - |
| ction arose at: | Depositions | | | | | | | | |

VS GORDON VS. ROBERT L. BURR, ET-AL

# 71 CIV. 1285

| | PROCEEDINGS | Date Order or Judgment Noted |
|---|---|---|
| -71 | Filed Complaint. Issued Summons. | |
| .71 | Filed ANSWER of Elpac Inc. to the complaint. | B&G |
| 8-71 | Filed Notice of Appearance for deft., Robert L. Burr. | |
| -71 | Filed stip and order that time of deft Robert L. Burr to Answer the complaint is extended to 6-8-71 McGohey J. | |
| 0-71 | Filed stip and order that the time for deft. Robert L. Burr, to answer complaint is ext. to 6-18-71. So Ordered; Lasker, J. | |
| -71 | Filed ANSWER of defts. Arnold Lord and Philips, Appel & Walden, Inc. to complaint. | S&G |
| -71 | Filed ANSWER of Robert L. Burr to complaint. | R&C |
| -71 | Filed summons with marshal's ret. Served Robert L. Burr on 4/7/71 at Santa Ana, Calif. | |
| | Summons Arnold Lord - UNABLE TO SERVE. | |
| | Served: Philipps, Appel & Walden by Stanley Hershfang, Treas. on 4/19/71. | |
| | Served: Elpac, Inc. by Leonard E. Lowe, Treas. on 3/23/71. | |
| .72 | Filed Deft Robert L. Burr's Order to Show Cause before Hon. Arnold Bauman, 12/8/72, 2:00 P.M. | |
| ,72 | Filed Pltff's Stip & Order re: motion to require deposition of Deft be taken in Calif instead of NYC, is adjourned to 1/5/73. So Ordered. Bauman, J. | |
| ,72 | Filed Pltff Stipulation of deposition of Elpac, Inc. is adjourned to 12/27/72, 2:00 P.M. Further Stipulated that time during Balterman & Geist may move for protective order or orders pursuant to Rule 26(c) FRCP is hereby extended to 12/27/72. Bauman, J. | |
| ,73 | Filed Memo End. on Order to Show Cause dated 12/5/73. Motion withdrawn. So Ordered. Bauman, J. & Affdvt of Milton Cooper. re: Burr. | |
| ,73 | Filed Deft Elpac, Inc. Stipulation adjourning deposition till 1/17/73, 2:00 P.M. So Ordered. Bauman, J. | |
| ,73 | Filed ANSWER TO CROSS-CLAIMS of Deft Elpac, Inc. | R&C |
| -73 | Filed Stip and Order that Burrowsky, Schwenke & Devine, 230 Park Ave, NYC. be substituted as atty for deft Arnold Lord. BAUMAN, J. | |
| 9-73 | Filed Consent Order to Substitute Messers; Bressler, Meislin, Tauber, Lipsitz be substituted as atty's for Schulman & Casarch for deft Philips, Appel, Walden, Inc. So Ordered Bauman J. | |
| 3 | Filed ORDER- Ordered that the time for pltff and defts to take the deposition of deft Arnold Lord is hereby extended to and including the second day of Apr, 1973, that the time for defts to take the deposition of pltff Irving Gordon is hereby extended to 4-5-73 and that all parties hereto shall be ready to commence the trial of this action on 5-10-73. BAUMAN, J. (mn) | |
| 1-73 | Trial begun before USDJ, Arnold Bauman without a jury. | |
| 2-73 | Trial concluded, decision reserved as to all deft. | |
| -73 | Filed transcript of the record of proceedings dtd. Apr 11,12, 1973 | |
| 4-73 | Filed transcript of record of proceedings of April 11,12-1973. | |
| 4-73 | Filed supplemental proposed findings of fact on behalf of deft. "PAW". | |
| 4-73 | Filed proposed findings of fact on behalf of defts. Robert L. Burr, et al | |
| 4-73 | Filed proposed findings of fact on behalf of pltff. | |
| 4-73 | Filed deft's (Burr) memorandum re: supplemental to joint memorandum submitted by all defts. | |
| 4-73 | Filed post-trial memorandum of law submitted jointly on behalf of defts. Burr, et al | |
| 4-73 | Filed deft's (Philips, Appel & Walden, Inc. supplemental post-trial memorandum | |
| 4-73 | Filed memorandum after trial of deft. ELPAC, Inc. & proposed findings of fact & conclusions of law. | |
| 4-73 | Filed pltff's post-trial brief. | |

////////

cont'd on page 2

| DATE | FILINGS—PROCEEDINGS | AMOUNT REPORTED IN EMOLUMENT RETURNS |
|---|---|---|
| Nov. 14-73 | Filed OPINION #40009-Pltff is entitled to rescission of his purchase of 4,500 shares against Burr, the seller. The action is dismissed as to Lord and P.A.W. because pltff, having chosen rescission, states no claim against either of these defendants. The action against Elpac is dismissed on the merits. The parties are directed to settle a judgment on notice-- Bauman,J. | |
| Dec. 11-73 | Filed Judgment-that the sale of 4,500 shares of stock of Elpac,Inc. made by deft. Robert L. Burr to pltff. is hereby rescinded--That deft. Burr pay to the pltff. the sum of $45,00 by cash or certified check against the concurrent del delivery of the said shares on 1-20-74-that the complaint against deft. Elpac Inc is dismissed on the merits-that complaint be dismissed as against defts. Arnold Lord & Phillips sued as Phillips Appel & Walden--Bauman,J.- Judgment entered--Clerk. ent. 12-13-73. | |
| Dec.20-73 | Filed pltffs affdvt & notice of motion to vacate judgment. Ret. 1-9-74. | |
| Dec.20-73 | Filed pltffs memo of law in support of motion. | |
| Jan.9-74 | Filed stip and order adjourning pltfs. motion until Jan.23-74. BAUMAN.J, | |
| Jan.21-74 | Filed deft's Phillips, Appel & Walden affdvt in opposition to motion to set aside judgment. | |
| Jan.21-74 | Filed deft's memo of law in opposition to motion. | |
| Jan,21-74 | Filed deft. Lord memo of law in opposition to pltfs. motion to set aside judgment. | |
| Feb.1-74 | Filed Stip and order adjourning motion un; til 1-30-74. BAUMAN,J. | |
| May 2-74 | Filed MEMO; pltfs. motion pursuant to Rules 59(a) & 60 (b) is denied. *** Bauman,J. | |
| May 24-74 | Filed notice of appeal from the decision and order entered May 2-74. Notice of appeal filed by the plaintiff ( m/n). | |
| JUN 6-74 | Filed notice of cross-appeal by deft Arnold Lord from that portion of the Judgment entered in this action Dec. 12-73, which is based upon the statements in the decision dtd: Nov. 13-73 to the effect that deft. Lord violated the federal securiti laws. m/n. | |
| Jun5,74 | Filed Notice of Cross-Appeal by deft Philips, Appel & Walden, Inc. FR M that portion of the Judgment entered in this action Dec 12,73.(filed 12-11-73), which is based upon t e statements in the decision dtd: Nov 13,73(filed 11-14-73) Notices mailed on 6-11-74 to Leonard Loewinthan, Esq. , Rogers & Cooper, Esqs., Butowsky, Schwenke & Devine, Esqs., Balterman & Geist, Esqs. | |
| Jun 11-74 | Filed Notice to the Docket Clerk that the record has been Certified and transmitted to USCA on Jun 11-74. | |

COMPLAINT
(Filed March 19, 1971)

4a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON

Plaintiff

71- Civil Action No. 1285 1971

-against-

COMPLAINT

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN

Defendants

----------X

Plaintiff, by his attorney, Leonard Loewinthan, for his complaint alleges:

1. This Court has jurisdiction of this action under Section 10 (b) of the Securities Exchange Act of 1934 and Reg. §240.10 b-5.

2. Plaintiff IRVING GORDON is a resident of Queens County, in the State of New York, with his place of business in the Southern District of New York at 331 Madison Avenue, County of New York, State of New York.

DKI

3. Upon information and belief defendant ELPAC, INC. (herein called "Defendant Elpac") is a corporation organized and existing under the laws of the State of California with offices at 18651 Von Karman Avenue, Irvine, California.

4. Upon information and belief, defendant ROBERT L. BURR (herein called "Defendant Burr") is a resident of California and was, at all times hereinafter mentioned, the President and a Director of Defendant Elpac.

DKI

5. Defendant PHILLIPS, APPEL & WALDEN (herein called "Defendant Partnership") is a brokerage partnership doing business under the firm name of PHILLIPS, APPEL & WALDEN with its principal place of business located within the Southern District of New York at 111 Broadway in the County of New York, State of New York, and at 469 Seventh Avenue, New York, New York.

6. Upon information and belief at all times hereinafter mentioned the defendant ARNOLD LORD (hereinafter called "Defendant Lord") was a resident of the Southern District of New York and was an employee of the Defendant Partnership.

7. The acts and transactions of which complaint is made herein were committed within the Southern District of New York.

8. In or about June 1968, within the Southern District of New York, the Defendant Burr offered to sell to the plaintiff and others present at a meeting 20,000 shares of Defendant Burr's stock in the Defendant Elpac.

9. Upon information and belief from in or about June 1968 through August 1968 the defendants Lord and Burr, acting for themselves, and for the Defendant Elpac and the Defendant Partnership, respectively, conspired together and maliciously and wilfully entered into a scheme to cause the plaintiff to purchase 4,500 shares of Defendant Elpac stock owned by the Defendant Burr for the sum of $10.00 per share, and to deprive the plaintiff of his money, by warranting and representing:

(a) That the arrangement for the sale of 20,000 shares of Defendant Elpac stock owned by the Defendant Burr and offered to the original group of persons present at the meeting in June 1968 as set forth in Paragraph "8" above of which plaintiff was one such person, had been consummated; and

(b) That each of the said persons at the said meeting of June 1968 referred to above had accepted the arrangement and had purchased his allotted shares of the Defendant Elpac stock from the Defendant Burr and each person was forwarding his check for the same; and

(c) That the stock would be registered no later than April 30, 1969; and

(d) The Defendant Burr would receive written permission from the Defendant Elpac to consummate the sale of his shares of stock in the Defendant Elpac to the plaintiff; and 6a

(e) The Defendant Burr would receive written permission from the California State Commission to consummate the said sale of stock; and

(f) The Defendant Burr would receive written permission from any banks or others to which the Defendant Elpac was indebted to consummate the said sale of stock; and

(g) The Defendant Burr would deliver to the plaintiff and other purchasers of any of his stock a written guaranty as to when the stock would be registered; and

(h) The Defendant Burr would lend the funds received from the plaintiff and others for the sale of his stock, to the Defendant Elpac for the sole purpose of causing the Defendant Elpac to pay the corporate note or notes held by creditor banks, which said note or notes had been personally guaranteed by the Defendant Burr; and

(i) The Defendant Elpac was at the time of the offer to sell the aforesaid stock operating at a profit and that the Defendant Elpac had enough current orders to produce a big profit for the year 1969.

10. That on or about August 22, 1968 within the Southern District of New York, the plaintiff caused to be delivered to the Defendant Burr a bank check in the sum of $45,000 representing the purchase price of 4,500 shares of Defendant Burr's stock in the Defendant Elpac, at $10.00 per share.

11. The defendants Burr and Lord acting for themselves and in behalf of the Defendant Elpac and the Defendant Partnership violated Section 10 (b) of the Securities Exchange Act of 1934 and Reg. §240.10 b-5 in that

the Defendants Burr and Lord in connection with the offer to sell and sale 7a
of the stock of Defendant Elpac, by use of means and instruments of transportation and communication in interstate commerce and by use of the mails, telephone and telegraph, directly and indirectly in the Southern District of New York and elsewhere, employed manipulative, deceptive and fraudulent devices, schemes and artifices to defraud and obtain money and property from the plaintiff by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, which statements or omissions said defendants Burr and Lord acting for themselves and in behalf of the Defendant Elpac and the Defendant Partnership, respectively, made with the knowledge or reasonable grounds to believe that they were untrue or misleading, and engaged in transactions, practices and course of business which operated as a fraud and deceit on plaintiff as purchaser of Defendant Elpac stock from the Defendant Burr.

12. That the aforesaid manipulative deceptive and fraudulent devices, schemes and artifices employed by the defendants Burr and Lord acting for themselves and for the Defendant Elpac and the Defendant Partnership, respectively and the aforesaid untrue statements of material facts and the omissions to state material facts and the aforesaid transactions, practices and course of business which operated as a fraud on plaintiff consisted of the acts, statements, omissions and concealments set forth in subdivisions "a", "b", "c", "d", "e", "f", "g", "h", and "i" of Paragraph "9" above and plaintiff incorporates by reference herein each and every allegation of such subdivisions.

13. Said representations and statements were false and known to be false by defendants when made by reason of the following: 8a

(a) The arrangement for the sale of 20,000 shares of Defendant Elpac stock owned by the Defendant Burr had not been consummated.

(b) That each of the persons present at the meeting in June 1968 had not accepted the arrangement and had not purchased the allotted shares of the Defendant Elpac stock, and in fact none of the persons, other than the plaintiff, forwarded a check for the purchase of Defendant Elpac stock.

(c) The stock purchased by the plaintiff was not registered by April 30, 1969 or at any time thereafter.

(d) The Defendant Burr did not receive permission from the Defendant Elpac to consummate the sale of his stock to the plaintiff.

(e) The Defendant Burr did not receive written permission from the California State Commission to consummate the sale of his stock to the plaintiff.

(f) The Defendant Burr did not receive written permission from creditor banks of defendant Elpac, to consummate the sale of his stock to the plaintiff.

(g) The Defendant Burr did not deliver his written guaranty as to when the stock sold to the plaintiff would be registered.

(h) The Defendant Burr did not lend the funds received from the plaintiff to the Defendant Elpac and the Defendant Elpac did not pay corporate notes held by creditor banks.

(i) The Defendant Elpac was not operating at a profit at the time that the Defendant Burr offered to sell his stock to the plaintiff and the Defendant Elpac did not have current orders sufficient to produce a profit for the year 1969.

14. Plaintiff believed in and relied upon the statements and representations made to him by the defendants Burr and Lord acting in their own behalf and in behalf of the Defendant Elpac and the Defendant Partnership and plaintiff was induced by said statements and representations to purchase the stock of the Defendant Burr in the Defendant Elpac. 9a

15. The plaintiff elects to rescind his purchase as set forth in Paragraph "10" above and demands recovery of the consideration paid for the Defendant Elpac stock as set forth in said Paragraph "10" above with interest thereon from the date of purchase, or in the alternative, damages equal to the full amount of $45,000. the purchase price paid by plaintiff for the stock of Defendant Elpac.

WHEREFORE, plaintiff demands judgment against the defendants and each of them in the sum of $45,000, together with appropriate interest thereon, together with the costs and disbursements of this action and for such other and further relief as this Court may deem proper.

Leonard Loewinthan Law

Leonard Loewinthan
Attorney For Plaintiff
Office & P. O. Address
One East 57th Street
New York, N. Y. 10022
Plaza 9-8585

## ANSWER OF DEFENDANT ELPAC, INC.
(Filed April 16, 1971)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

| | |
|---|---|
| IRVING GORDON,<br><br>Plaintiff<br><br>- against -<br><br>ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,<br><br>Defendants. | CIVIL ACTION<br><br>FILE NO. 1285/71<br><br>ANSWER |

Defendant, Elpac, Inc., as and for its Answer to the Complaint herein, by Balterman & Geist, its attorneys, shows as follows:

FIRST: Denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegations contained in paragraphs marked 2, 5, 6, 7, 8, 10 and 15 of the Complaint herein.

SECOND: Denies each and every allegation contained in paragraph marked 4 of the Complaint herein except admits that between the period June, 1968 and February, 1969, Defendant, Robert L. Burr, was a director of Defendant, Elpac, Inc., and during the period June, 1968 and August 7, 1968, Defendant, Robert L. Burr, was the president of Defendant, Elpac, Inc. and denies any knowledge or information thereof sufficient to form a belief as to the truth of the allegation contained in paragraph marked 4 of the Complaint hereof which pertains to the Defendant, Robert L. Burr being a resident of California.

THIRD: Denies each and every allegation contained in paragraph marked 9 of the Complaint herein and in each and every subparagraph thereof.

FOURTH: Denies each and every allegation contained in paragraphs marked 11, 12 and 14 of the Complaint herein.

FIFTH: Denies each and every allegation contained in paragraph marked 13 of the Complaint herein and in each and every subparagraph thereof.

FIRST DEFENSE

1. The Complaint fails to state a claim against Defendant, Elpac, Inc. upon which relief can be granted.

SECOND DEFENSE AND CROSS-CLAIM AGAINST DEFENDANT, ROBERT L. BURR

1. At all the times referred to in the Complaint, and in this Defense, Defendant, Elpac, Inc., was a corporation organized and existing under the laws of the State of California.

2. Between the period June, 1968 and February, 1969, Defendant, Robert L. Burr, was a director of Defendant, Elpac, Inc. and during the period June, 1968 and August 7, 1968, Defendant, Robert L. Burr, was the president of Defendant, Elpac, Inc.

3. If the acts and transactions complained of in the Complaint herein and alleged to be wrongful and/or in violation of law were, in fact, performed, and did, in fact, occur, they were not performed by, or for the benefit of, Defendant, Elpac, Inc.

4. If the acts and transactions complained of in the Complaint herein and alleged to be wrongful and/or in violation of law were, in fact, performed, and did, in fact, occur, Defendant, Elpac, Inc. did not authorize them to be performed or to occur.

5. If the acts and transactions complained of in the Complaint herein and alleged to be wrongful and/or in violation of law were, in fact, performed, and did, in fact, occur, they were performed by and for the benefit of, Defendant, Robert L. Burr.

6. If the Plaintiff herein recovers judgment against the Defendant, Elpac, Inc. for the acts and transactions complained of in the Complaint herein and alleged to be wrongful and/or in violation of law, such will have been brought about and caused by wrongful and unlawful acts on the part of Defendant, Robert L. Burr and not by reason of any wrongful and/or unlawful act on the part of Defendant, Elpac, Inc.

7. By reason of the aforegoing, Defendant, Robert L. Burr, is or may be liable to Defendant, Elpac, Inc. for all or part of the claim asserted in this action by Plaintiff against Defendant, Elpac, Inc.

THIRD DEFENSE AND CROSS-CLAIM AGAINST DEFENDANT, ROBERT L. BURR

1. Defendant, Elpac, Inc. repeats and realleges each and every allegation contained in paragraphs marked 1, 2, 3, 4, 5 and 6 of the Second Defense and Cross-Claim against Robert L. Burr contained in this Answer.

2. If the Plaintiff herein recovers judgment against the Defendant, Elpac, Inc. for the acts and transactions complained of in the Complaint herein and alleged to be wrongful and/or in violation of law, such will have been brought about and caused by wrongful and unlawful acts on the part of Defendant, Robert L. Burr and not by reason of any wrongful and/or unlawful act on the part of Defendant, Elpac, Inc. and such will further

have been brought about as a result of the breach of fiduciary duty owed by Defendant, Robert L. Burr to Defendant, Elpac, Inc. as a director and officer of Defendant, Elpac, Inc.

3. By reason of the foregoing, Defendant, Robert L. Burr is or may be liable to Defendant, Elpac, Inc. for all or part of the claim asserted in this action by Plaintiff against Defendant, Elpac, Inc.

WHEREFORE, the Defendant, Elpac, Inc. demands judgment dismissing the Complaint herein as to it with costs and disbursements of this action or that it have judgment over and against the Co-Defendant, Robert L. Burr for any sum which may be recovered herein by the Plaintiff against the Defendant, Elpac, Inc., together with the costs and disbursements of this action.

BALTERMAN & GEIST

By _____
Harry Balterman
A Member of the Firm
Attorneys for Defendant, Elpac, Inc.
Office and P. O. Address
Ten East Fortieth Street
New York, New York 10016
(212) 684-7070

ANSWER OF DEFENDANTS ARNOLD LORD, AND PHILIPS, APPEL & WALDEN, INC.
(Filed June 15, 1971)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON

Plaintiff

-against-

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC.

Defendants.

CIVIL ACTION

71 File # 1285

ANSWER OF DEFENDANTS ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC.

----------X

Defendants, ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC., by their attorneys, Schulman & Gasarch, as and for their answer to the complaint herein:

FIRST: Deny any knowledge or information sufficient to form a belief as to each and every allegation and statement contained in paragraphs "2" to "4" of the complaint.

SECOND: Defendant Philips, Appel & Walden, Inc. denies each and every allegation in paragraph "5" of the complaint, except admits that defendant Philips, Appel & Walden, Inc. is a corporation duly organized and existing under the laws of the State of New York with its principal places of business located at 111 Broadway, New York, New York and 469 Seventh Avenue, New York, New York.

THIRD: Admit the allegation contained in paragraph 6 of the complaint.

FOURTH: Deny any knowledge or information sufficient to form a belief as to each and every allegation and statement contained in paragraphs "7" and "8" of the complaint.

FIFTH: Deny each and every allegation contained in paragraph "9" (a-i) of the complaint.

SIXTH: Deny any knowledge or information sufficient to form a belief as to the allegations contained in paragraph "10" of the complaint.

SEVENTH: Deny each and every allegation and statement contained in paragraphs "11" and "12" of the complaint.

EIGHTH: Deny any knowledge or information sufficient to form a belief as to the allegations and statements contained in paragraph "13" (a-i) and "14" of the complaint.

AS AND FOR A FIRST DEFENSE

NINTH: Defendant Philips, Appel & Walden, Inc. acted neither as agent nor principal nor participated in any manner whatsoever in the alleged offer and sale of the common stock of ELPAC, INC. nor did it receive any form of commission or compensation either directly or indirectly therefrom. Philips, Appel & Walden, Inc. never executed a purchase or sale transaction in the common stock of ELPAC, INC. for the plaintiff's account.

AS AND FOR A SECOND DEFENSE

TENTH: Defendant Arnold Lord had no connection whatsoever with the ultimate purchase by plaintiff and has no knowledge of the terms and conditions pursuant to which this purchase was made and what, if any, representations were made to the plaintiff by the seller.

AS AND FOR A THIRD DEFENSE

ELEVENTH: Defendant Lord acted neither as agent for plaintiff nor as agent for any of the other defendants herein with regard to the purchase by plaintiff. Lord received no compensation of any kind or nature from any of the parties hereto or any other source.

WHEREFORE, the defendants, ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC. herein demand judgment dismissing the complaint together with costs and such other and further relief as to this Court may seem just and proper.

Robert D. Schulman

Schulman & Gasarch
Attorneys for Defendants
Arnold Lord and
Philips, Appel & Walden, Inc.
Office and P.O. Address
90 Broad Street
New York, New York 10004
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ANSWER OF DEFENDANT ROBERT L. BURR
UNITED STATES DISTRICT COURT (Filed June 21, 1971)
SOUTHERN DISTRICT OF NEW YORK



----------X

IRVING GORDON,

Plaintiff,

-against-

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

----------X

CIVIL ACTION

FILE NO. 1285/71

ANSWER

Defendant, Robert L. Burr, as and for his answer to the complaint herein, by his attorneys, Rogers & Cooper, alleges:

FIRST: Denies knowledge or information sufficient to form belief as to the truth of the allegations contained in the Paragraphs of the complaint marked "2" and "15".

SECOND: Denies that he was President of defendant Elpac, Inc. at any time subsequent to the 7th day of August, 1968; that he was a Director of said corporate defendant at any time subsequent to February, 1969; and otherwise admits the allegations contained in the Paragraph of the complaint marked "4".

THIRD: Admits defendant Lord was an employee of the defendant partnership; and otherwise denies knowledge or information as to the truth of the allegations contained in the Paragraph of the complaint marked "6".

FOURTH: Denies each and every allegation contained in the Paragraphs of the complaint marked "7", "9", "11", "12", "13" and "14".

AS AND FOR A FIRST DEFENSE:

FIFTH: The complaint fails to set forth a claim against this answering defendant upon which relief can be granted.

AS AND FOR A SECOND DEFENSE:

SIXTH: Upon information and belief, all the alleged facts of which plaintiff complains (if indeed they existed) were known to him since on or about the 30th day of April, 1969 as to some, and for a longer period of time as to others.

SEVENTH: Plaintiff made no election to rescind the purchase or to tender the stock referred to in the complaint until in or about April, 1971 by the commencement of this action, at least two years since he learned of the alleged existence of the facts complained of.

EIGHTH: By reason of the foregoing and such delay, and by refraining from commencing this action until April, 1971, plaintiff ratified and affirmed the purchase of said stock and cannot now maintain this action, and has been guilty of such laches as should in equity bar him from maintaining this action.

AS AND FOR A THIRD DEFENSE:

NINTH: Upon information and belief, the shares of stock for which this answering defendant received payment were purchased, at least in part, by and for the benefit of persons other than the plaintiff.

TENTH: By reason of the foregoing plaintiff

real party in interest herein and is not entitled to maintain this action.

WHEREFORE, the defendant Robert L. Burr demands judgment dismissing the complaint herein as to him, and that he have the costs and disbursements of this action.

ROGERS & COOPER

By _____
Milton Cooper
A Member of the Firm
Attorneys for Defendant,
Robert L. Burr
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60 East 42nd Street
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YUkon 6-5678

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

IRVING GORDON,

Plaintiff,

-against-

OPINION

71 Civ. 1285

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

----------x

A P P E A R A N C E S

Leonard Loewinthan, New York City, for plaintiff.

Rogers and Cooper, New York City (Milton Cooper, of counsel) for defendant Burr.

Balterman and Geist, New York City (Alan Geist, of counsel) for defendant Elpac, Inc.

Butowsky, Schwenke and Devine, New York City (Michael C. Devine, Alan Steinberg, of counsel) for defendant Lord.

Biessler, Meislin, Tauber & Lipsitz (Steven Lipsitz, Neil M. Berson, of counsel) for defendant Phillips, Appel & Walden.

BAUMAN, D. J.

This is an action brought pursuant to § 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j)b and Rule 10b-5 promulgated thereunder, 17 C.F.R. § 240.10b-5. The case was tried before this court, sitting without a jury, and what follows constitutes my findings of fact and conclusions of law

pursuant to Rule 52(a) of the Federal Rules of Civil Procedure. 21a

I.

Irving Gordon, the plaintiff, has been employed as a certified public accountant for over twenty years. He is by his own admission an active investor in the stock market; during 1968, the year of the events in question, for example, he had accounts at two or three brokerage firms and perhaps $100,000 invested in securities. As an accountant he prepared balance sheets and profit and loss statements, conducted audits of corporate clients and prepared tax returns.

In June, 1968, entirely by chance, Gordon met two men in the lobby of the hotel known as Caesar's Palace in Las Vegas. One was Howard Mann, an acquaintance of Gordon's for over twenty years; the other was Arnold Lord, a defendant herein, who was at that time a registered representative associated with Phillips, Appel & Walden (P.A.W.), a New York brokerage firm, also a defendant. Mann explained to Gordon that he and Lord had just returned from a trip to the plant of the defendant Elpac, Inc., a California corporation which manufactured industrial machinery. Earlier in 1968 P.A.W. had managed a private placement of Elpac stock that raised approximately $1,500,000 for the corporation. In that transaction Mann had purchased 5,000 shares of Elpac stock at $10 per share. All this came out in the conversation and Lord went on to describe this to Gordon as an "excellent deal"; told him that the future of Elpac was promising, and that Elpac stock was currently a "very, very hot thing."

Against the backdrop of the whirring wheels of Las Vegas, Gordon, who had done accounting work for Mann and who respected his expertise in the market, found his interest powerfully stimulated. He asked how he might avail himself of this apparently splendid opportunity. Lord, with a master's sure touch, informed him that he would be "putting a package together" in the near future a piece of which he might make available to Gordon. Lord added that he could make no promises because "a lot of people are clamoring for" Elpac stock. With this understanding the men parted.

Within a week of his return to New York City, Gordon was called by Mann, who said that he had asked Lord to include Gordon in the next Elpac offering. Lord himself called a day or two later, acknowledged a conversation with Mann, and told Gordon that there would soon be a meeting of those interested in purchasing Elpac stock. In a second phone call Lord said that the number of shares to become available would be 20,000, of which Gordon could purchase 4,500.

The meeting was held in late June, 1968 at the offices of Steinberg and Pokoik, a real estate concern located at 575 Madison Avenue in New York City. Present at the meeting were Stuart Steinberg, Sr., a member of the firm in whose offices the meeting was held; his son Stuart Steinberg, Jr., a stockbroker at P.A.W.; a Mr. Adlman, another P.A.W. broker; Steven Greenberg, described as a promoter for Elpac; Stanley Jacobson, an attorney representing the Steinbergs, and two gentlemen from Philadelphia

whose names are presently beyond the recollection of the participants. Also present were Lord and Robert Burr, then president of Elpac[1/] and a defendant in the instant action. With the exception of Lord, Gordon had never met any of these men before, although at the meeting he seemed to become apprised of their respective occupations.

Once assembled the group was informed that Burr wished to sell some of his Elpac stock, that he was desirous of selling 20,000 shares all at once and, consequently, would not sell any fraction thereof. Burr initially asked a price of $12 per share, but Steinberg, Jr. undertook to negotiate a lower price and appeared to have some success. It was Gordon's understanding that the purchasers were to be himself, Steinberg, Jr., Adlman, and the two men from Philadelphia and that Steinberg, Jr.'s purchase was to be approximately twice his own, in the range of 8 or 9,000 shares.

Jacobson questioned Burr persistently and set various conditions that he insisted be met prior to the consummation of the sale. First, Burr was to obtain the consent of the California Commissioner of Corporations to the sale. Second, he was to obtain a resolution of Elpac's Board of Directors consenting to the registration of Burr's stock. Third, he was to guarantee that the stock would be registered not later than April 30, 1969.

After the meeting broke up several of the participants sought an estimate of Elpac's profits in the near future. Burr stated, in the financial cliche of our times, that the corporation

had "turned its corner" and would show a profit for July and for the remainder of 1968. He went on to say that the volume of orders indicated that there would also be a profit in 1969. When these statements were made, Gordon asked to see some financial statements and Burr promised to send him monthly unaudited figures from July onward.

Sometime in July, 1968, within two weeks of this meeting, Lord called Gordon, told him that the necessary documents were coming from California, and asked him to come to Lord's office at P.A.W. The two men met there on July 18, 1968. Also present during all or part of this meeting was George James, an associate of Lord's. At this time Gordon executed two documents, a "Statement of Transferee"[2/] which was immediately notarized and a letter to Robert Burr.[3/] When Gordon questioned the need for these documents, Lord explained that they were required in order to expedite the sale of the shares, that "everybody has already done it" and that Gordon was indeed the last to do so. Although Lord denies having made these statements, I find his denials not worthy of belief. Gordon also asked Lord when the transaction would be approved by the California Division of Corporations and when the corporation would authorize registration. Lord responded that these matters were being "worked on". He also repeated the glowing prognosis of the corporation's future that had been given at the Steinberg and Pokoik meeting. It should also be noted that before signing these documents Gordon consulted neither with Jacobson, who by common consent was to act on behalf of all of

the prospective purchasers of Elpac stock, nor with Stuart Steinberg, Jr., whose office at P.A.W. was but a few feet from Lord's. 25a

Lord called Gordon on at least two occasions in early August, 1968. On each occasion he explained that "red tape" had caused unforeseen delays in processing the various documents necessary for the transaction, but sought to assure him that everything would be resolved shortly. Gordon repeated his request for the corporate financial statements he had been promised and was told that these too would be forthcoming "soon".

On August 20, 1968, plaintiff received a telegram from Burr in California. In it, Burr stated that he agreed to sell Gordon 4,500 shares of Elpac at $10 per share provided that $45,000 was received at Burr's California bank by 1:00 P.M. next day. The telegram also recited that the Elpac board had approved the registration of the securities. Gordon immediately called Burr and, finding Lord on another extension in his office, informed both men that he was unable to get the money to California on that day. Burr agreed that receipt of the money on the 22nd would be satisfactory. Gordon then made the necessary arrangements for his bank to wire the funds to California.

On the 22nd Lord and Burr appeared at plaintiff's office, at which time Burr altered the wording of the telegram to reflect the extension of time for payment that he had granted Gordon. Both Burr and Lord then initialed the changes. In the course of their conversation Gordon renewed his already familiar catechism

of when the documents approving the sale would be forthcoming, 26a when the monthly financial statements would be furnished, etc. He was told that everything was being taken care of, that the corporation was doing well, and that all of the other members of the group had sent their money as he had.

In the months that followed Gordon was unsuccessful in obtaining not only the documents he had so frequently requested, but also his stock certificates. During September and October he repeatedly spoke to Burr and Lord by phone and was, as usual, assured that all was well. In December, 1968 he was told by Lord that his stock certificates were available at the P.A.W. offices. When Gordon visited these offices in December or January, 1969, no one appeared to have any knowledge of the matter, nor did anyone, including George James, who shared Lord's office, inform him that Lord's employment by P.A.W. had terminated in late 1968.

In the ensuing weeks, Gordon's efforts to contact Lord met with frustration. When he called, Lord would inevitably be out, and when he left messages Lord would fail to return the calls. Gordon finally managed to reach Lord in March, 1969. Lord insisted that the stock was at P.A.W. and told him to pick it up there. On his second trip he met Steinberg, Jr. and began to discuss the Elpac stock offering. Steinberg told him that he had not purchased Elpac stock, nor, so far as he knew, had anyone else who attended the original meeting.[4/] Gordon later placed an indignant phone call to Lord and demanded an explanation. Lord stated that explanations were impossible over the telephone but

that he would receive his stock, which finally happened on March 28, 1969. During 1969 he made efforts, through Howard Mann and others, to obtain a refund of his purchase price which, needless to say, were unsuccessful.

II.

In order to state a claim under § 10(b) and Rule 10b-5, plaintiff must prove the following elements: (1) misrepresentations, omissions, or the employment of some deceptive scheme; (2) materiality; (3) scienter; and (4) reliance. Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968). Plaintiff's burden varies, however, with respect to different defendants. With respect to Burr and Lord, with whom he had face to face dealings, he must establish liability under § 10(b). Elpac and P.A.W., however, can only be found liable as controlling persons under § 20 of the Securities Exchange Act, 15 U.S.C. § 78t,[5/] as "aiders and abettors", or under the common law principle of agency. Thus that aspect of the following discussion that concerns § 10(b) will consider the actions of Burr and Lord. Once their liability under § 10(b) is established, the secondary liability of Elpac and P.A.W. will be considered.

It should be noted at the outset that the discussion of the liability of Lord, Elpac and P.A.W. is rendered wholly academic by plaintiff's choice of the remedy of rescission (see plaintiff's Post Trial Brief, p. 40 and Tr. 261) which is available only against Burr, the seller of the securities. As will appear below, I have concluded that plaintiff is entitled to that remedy. I

have nevertheless discussed the liability of the other three defendants because I am mindful of the precedent of Baumel v. Rosen, 412 F.2d 571 (4th Cir. 1969), affirming in part and reversing in part, 283 F.Supp. 128 (D.Md. 1968). In Baumel the Fourth Circuit affirmed the district court's finding of liability but held rescission an inappropriate remedy and awarded damages instead. Should the Court of Appeals reach a similar conclusion in the instant case, I think it will be useful for them to have the benefit of my views on the liability of the remaining defendants. 28a

A. Plaintiff has not succeeded in establishing all of the misrepresentations alleged in his complaint. For example, although I have found that Burr represented to those assembled at the Steinberg and Pokoik meeting that Elpac had "turned its corner" and would show a profit for July and for the following months, plaintiff has failed to establish that this constituted a misrepresentation. This is so simply because plaintiff offered no evidence of Elpac's financial condition during 1968, 1969, or any other time. Similarly, the failure to furnish monthly financial statements might have constituted a fraudulent course of conduct had plaintiff introduced some evidence of what such statements contained.

I am nevertheless satisfied that Lord and Burr did make at least one determinative misstatement regarding the extent of the participation in the Elpac offering.

At the meeting at Steinberg and Pokoik, Burr stated 29a
that he was only interested in selling his 20,000 shares as a package, and would not sell any lesser amount. At the meeting of July 18, 1968 at P.A.W., Gordon was told by Lord that all of the other members of the group had executed the documents then presented to Gordon, and on August 22 both Burr and Lord assured Gordon that other members of the group had effected payment in the same way that Gordon had. These statements were demonstrably false.

B. The classic formulation of the materiality requirement is found in List v. Fashion Park, 340 F.2d 457 (2nd Cir. 1965), cert. denied, 382 U.S. 811 (1965). "The basic test of 'materiality' ... is 'whether a reasonable man would attach importance to the fact misrepresented in determining his choice of action in the transaction in question.' (Citations omitted)." See also Radiation Dynamics, Inc. v. Goldmuntz, 464 F.2d 876 (2nd Cir. 1972); Shapiro v. Merrill Lynch, Pierce, Fenner & Smith, 353 F.Supp. 264 (S.D.N.Y. 1972). It should further be borne in mind that material information need not be limited to information translatable into earnings. Myzel v. Fields, supra, at 734, citing SEC v. Texas Gulf Sulphur Co., 258 F.Supp. 262 (S.D.N.Y. 1966). The Court of Appeals in List pointed out that materiality is, in essence, an objective standard that accompanies the subjective standard of reliance: "[t]hus, to the requirement that the individual plaintiff must have acted upon the fact misrepresented, is added the parallel requirement that a reasonable man

would also have acted upon the fact misrepresented." (Italics in original). I am satisfied that the misrepresentations already set forth were material to a determination to purchase Elpac stock. 30a

I am convinced that the misstatements regarding the participation of other members of the Steinberg and Pokoik group were highly material. Two recent cases buttress that conclusion. In Myzel v. Fields, supra, a defendant director misrepresented to plaintiff, a shareholder, that another shareholder was "going to get out of the company", i.e. sell his stock. The court held that this representation "could be considered actionable as a misstatement of another's intent or state of mind." 386 F.2d at 734. In Moerman v. Zipco, 302 F.Supp. 439 (E.D.N.Y. 1969), aff'd. 422 F.2d 871, reh. denied, 430 F.2d 362 (2nd Cir. 1970), plaintiff was induced to subscribe to defendant's stock offering by the representations that the corporation would have only a small group of shareholders. In actuality over 200 people subscribed. Judge Judd found that such a misrepresentation was material in that a reasonable man would accord it importance in determining his course of action. I agree with the conclusions reached in Myzel and Moerman and conclude that the participation of the other prospective purchasers was material to Gordon's decision. The behavior of the other investors, particularly those offered precisely the same "deal" in terms of price, registration rights, etc. will inevitably influence another investor

similarly situated. The knowledge that a group, apparently made privy to such a unique opportunity, had all repudiated this opportunity is likely to give any prospective buyer pause.

C. The increasingly elusive concept of reliance also finds its classic formulation in List v. Fashion Park, supra, at 462: "The test of 'reliance' is whether 'the misrepresentation is a substantial factor in determining the course of conduct which results in the recipient's loss' (Citations omitted)." The Court went on to note that "[t]he reason for this requirement ... is to certify that the conduct of the defendant actually caused the plaintiff's injury." See also Colonial Realty Corp. v. Brunswick Corp., 337 F.Supp. 546 (S.D.N.Y. 1971). However, in Affiliated Ute Citizens v. United States, 406 U.S. 128 (1972), the Supreme Court added the following modification: "[u]nder the circumstances of this case, involving primarily a failure to disclose, positive proof of reliance is not a prerequisite to recovery. All that is necessary is that the facts withheld be material in the sense that a reasonable investor might have considered them important in the making of this decision." 406 U.S. at 153-154. See also Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341 (2nd Cir. 1973) at 399 (Mansfield, J. concurring and dissenting.)

Affiliated Ute Citizens thus appears to leave open the question of the existence of a reliance requirement where the

gravamen of the offense is misrepresentations rather than non- 32a
disclosure. I deem it unnecessary to resolve that difficulty here, for there is ample evidence in the record that Gordon relied on the misrepresentations of Lord and Burr. This is particularly so with regard to the participation of other members of the Steinberg and Pokoik group. As I have already noted, as late as July 18 and August 22 Gordon required the reassurance that the other members of the group had already acted before committing himself to the transaction. It is clear too that he was impressed by the substantial amount of money (between $80 and $90,000) Steinberg, Jr. was willing to commit in the offering.

The defendants vigorously dispute plaintiff's claim of reliance. They contend, first of all, that some allowance should be made for plaintiff's sophistication as an investor, which should at the very least increase his burden of proving that he relied on others no more, and perhaps less expert than he. See Kohler v. Kohler, 208 F.Supp. 808 (E.D.Wis. 1962), aff'd. 319 F.2d 634 (7th Cir. 1963).

This contention ignores both the law of this circuit and the facts of this case. A recent study[6/] strongly suggests that our Court of Appeals has been loath to modify the reliance requirement to account for characteristics peculiar to the individual plaintiff.[7/] See List v. Fashion Park, supra; Heit v.

Weitzen, 402 F.2d 909 (2nd Cir. 1968), cert. denied, 395 U.S. 903 (1969); SEC v. Texas Gulf Sulphur, 401 F.2d 833 (2nd Cir. 1968), cert. denied, 394 U.S. 976 (1969). Other circuits have apparently accorded greater weight to the plaintiff's background and expertise in determining reliance. See Kohler v. Kohler, supra; City National Bank v. Vanderboom, 422 F.2d 221 (8th Cir.), cert. denied, 399 U.S. 905 (1970); Clement A. Evans & Co. v. McAlpine, 434 F.2d 100 (5th Cir. 1970), cert. denied, 402 U.S. 988 (1971).

Even if one is, as defendants urge, to probe more deeply into the peculiar characteristics of the plaintiff, the following observations are perhaps also in order. Experience does not equal expertise, and there is nothing in plaintiff's behavior here to suggest that he possessed any particular investment acumen. He emerges, on the contrary, as a not particularly unique "greedy kind of guy", [8/] eager to make quick profits and thus rather vulnerable to the blandishments of those capable of concocting an appealing scheme. I suggest that despite his accounting background and the extent of his investments, plaintiff's expertise appears scarcely, if at all, better than average.

The second point that defendants raise in an effort to rebut plaintiff's allegations of reliance is that "there should be no doubt that he relied not upon any of the defendants but rather upon the fact that his lifelong friend, one Howard

Mann, had made a similar purchase in Elpac shortly before." (Defendants' Post Trial Memorandum of Law, p. 18). It cannot be questioned that one of the factors that motivated Gordon here was Mann's participation in a previous Elpac offering and his evident satisfaction with the transaction. It was undoubtedly Mann who first whetted Gordon's interest. Nevertheless once this interest was aroused, Gordon placed himself in the hands of Lord and Burr: he sought their advice, not Mann's, in July and August, 1968, and it was at their urging that he signed the documents and made payment for the stock. The record reveals further that he did not consult Mann again until Steinberg, Jr.'s revelations of March, 1969, at which point Lord and Burr's deception became clear. Thus I find that Mann's purchase was but one factor influencing Gordon, and it was easily superseded in importance by the statements and actions of Lord and Burr.[9/]



D. Plaintiff erroneously argues that proof of scienter is no longer required in actions under § 10(b). Our Court of Appeals has recently stated that there can be no violation of that section "in the absence of allegation of facts amounting to scienter, intent to defraud, reckless disregard for the truth, or knowing use of a device, scheme or artifice to defraud. It is insufficient to allege mere negligence." Shemtob v. Shearson, Hammill & Co., 448 F.2d 442 (2nd Cir. 1971). See also Lanza v. Drexel & Co., 479 F.2d 1277 (2nd Cir. 1973); Globus v. Law Research Service, Inc., 418 F.2d 1276 (2nd Cir. 1969), cert.

denied, 397 U.S. 913 (1970). The standard was further analyzed in Cohen v. Franchard Corp., 478 F.2d 115 (2nd Cir. 1973): "[a]lthough it is unnecessary to prove the specific fraudulent intent essential to a claim of common law fraud, it must be established that the defendant was to some extent cognizant of the misstatement or omission." Other circuits have, admittedly, abolished the scienter requirement. See Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); Stevens v. Vowell, 343 F.2d 374 (10th Cir. 1965); Myzel v. Fields, supra; Batchelor v. Legg & Co., 52 F.R.D. 545 (D.Md. 1971).

Given such a standard, I find that Lord and Burr possessed the requisite knowledge of the falsity of their representati ons to Gordon. In the meetings of July 18 and August 22, when they told Gordon that others had already subscribed to the Elpac offering, they could not help but realize the falsity of these statements. It is admitted that the additional copies of the documents which Gordon signed on July 18 were kept at P.A.W., and thus Lord must have known whether or not others had executed them. In addition, I find that the repeated failure to produce the Elpac financial statements in the face of Gordon's persistent requests is other and additional evidence of their intent to hide from him the realities of Elpac's financial condition. Any suggestion that this failure was purely inadvertent staggers the imagination in its audacity.

In conclusion, I am satisfied that plaintiff has proven the liability of Burr and Lord under § 10(b) and Rule 10b-5. I now turn to the secondary liability of Elpac and P.A.W.

III.

Before considering the liability of Elpac and P.A.W., a brief prefatory note regarding competing theories of liability is in order. Plaintiff alleged in his complaint that the defendants were liable under theories of agency, and aiding and abetting. At the trial and in his post trial brief he in effect amended his complaint by alleging that these defendants were "controlling persons" under § 20(a) of the Securities Exchange Act, set out at footnote 5, supra. The relationship between § 20(a) and other available theories of secondary liability remains unclarified, although it has recently been the subject of a thorough analysis in Ruder, "Multiple Defendants in Securities Law Fraud Cases: Aiding and Abetting, Conspiracy, In Pari Delecto, Indemnification and Contribution", 120 U.Pa. L.Rev. 597 (1972). It has been contended by some, most notably the SEC, that § 20 was not designed to cover the traditional employer-employee relationship; in such situation, traditional agency law would be a sufficient premise for liability. Instead, it is argued that § 20 was intended to reach situations in which there are "technical legal barriers" between those responsible for the fraudulent acts and those injured

by them. See Ruder, supra, at pp. 607-609. This view has found support in Johns Hopkins University v. Hutton, 297 F.Supp. 1165 (D.Md. 1968), aff'd in part and rev'd in part, 422 F.2d 1124 (4th Cir. 1970). See also Kamen & Co. v. Paul H. Aschkar & Co., 382 F.2d 689 (9th Cir. 1967), cert. dismissed, 393 U.S. 801 (1968). The principal virtue of this thesis, for a plaintiff, is that the defense of good faith, available under § 20, is unavailable under the theory of respondeat superior.

This is not, however, the view of the majority of circuits, as Judge Tyler has recently pointed out in S.E.C. v. Lum's, Inc., _____ F.Supp. _____, CCH Fed. Sec. Law Rep. ¶ 94,134 (S.D.N.Y. 1973).[10/] He reads both the majority and the dissenting opinions in Lanza v. Drexel & Co., supra, to suggest that § 20(a), and not respondeat superior is the appropriate standard for determining secondary liability under the Securities Exchange Act. Judge Judd's opinion in Moerman v. Zipco, Inc., supra, which was affirmed by the Court of Appeals, also supports the exclusivity of § 20(a). See also, Moscarelli v. Stamm, 288 F.Supp. 453 (E.D.N.Y. 1968). I agree with this construction and shall follow it in the analysis which ensues.

A. In considering P.A.W.'s liability, one must begin with the proposition that brokerage firms are obliged to exercise stringent supervision over their salesmen. Moerman v. Zipco, Inc., supra, at 447; Lanza v. Drexel & Co., supra, at 1301. See also S.E.C. v. Lum's, Inc., supra; Moscarelli v. Stamm, supra; Hecht v. Harris, Upham & Co., 283 F.Supp. 417 (N.D. Cal. 1968). Only by

demonstrating that it has maintained a high degree of supervision can a brokerage firm meet the burden of good faith required to escape liability under § 20(a).[11/] In one leading case the defendant's burden has been characterized thus: "[t]o satisfy the requirement of good faith it is necessary for the defendants to show that some precautionary measures were taken to prevent the injury suffered." Lorenz v. Watson, 258 F.Supp. 724 (E.D.Pa. 1966) at 732.

The record before me discloses that Gordon was not a regular customer of P.A.W., nor did P.A.W. have any formal role in managing the Burr offering, as it did with the May, 1968 private placement of 150,000 Elpac shares. These facts, however, only tend to establish that P.A.W. could not be held primarily liable under § 10(b); the standard under § 20(a) is a far lower one. The record does reveal that Lord was an employee of P.A.W. through November, 1968, and that the July 16 meeting at which Gordon executed the "Statement of Transferee" and the investment letter took place at P.A.W.'s offices. Paragraph 5(e) of the Statement of Transferee, filled out in advance by Lord and executed by Gordon, read as follows:

> "I have received advice from the following professional adviser or advisers in connection with my proposed investment in ELPAC, Inc.: (State 'none' if none.)
>
> Arnold Lord
> P A & W, 469 7 Ave. NYC 10018"

Although the defendant contends that Lord did no more here than set forth his business address, it should be noted that the question posed in 5(e) does not require such an address. One

must infer, at the very least, that Lord intended to insure that his institutional affiliation was known both to Gordon and to Elpac.

There is further evidence of P.A.W.'s involvement. fewer than three of its registered representatives (Adlman, Steinberg, and Lord) attended the June meeting at Steinberg and Pokoik. Furthermore, the circumstances of Lord's departure from P.A.W. and the nature of his subsequent relationship with the firm continue to be puzzling. Gordon attempted to call Lord on numerous occasions at P.A.W. but was never told that he no longer worked there. When he visited the P.A.W. offices in December, 1968 or January, 1969, no one, including Lord's office mate, saw fit to tell him that.

The foregoing strongly tends to suggest that P.A.W. failed to supervise its salesmen adequately. Furthermore, as I have already noted, P.A.W. had the burden of proving its good faith by demonstrating an adequate system of supervision. Yet P.A.W. called no witnesses at the trial. A demonstration of the kind of showing necessary to meet the good faith burden can be found in S.E.C. v. Lum's Inc., supra. There Lehman Brothers, the defendant broker-dealer, introduced several witnesses who testified to its supervisory system, which consisted of a compliance department staffed by several attorneys who would periodically meet with the firm's salesmen to discuss, inter alia, problems of inside information. Even with such a showing the trial court found the issue of the firm's liability a "close" one,

although it ultimately held for the defendant. No demonstration of good faith has been made here, and I am satisfied that P.A.W.'s involvement in these transactions is sufficient to hold it liable under § 20(a).

B. The problem of Elpac's liability is far more difficult, and the guidelines for corporate liability for the acts of its officers under § 20(a) are less defined than for that of brokerage firms. In Myzel v. Fields, supra, we are told that § 20(a) "has been interpreted as requiring only some indirect means of discipline or influence short of actual direction to hold a "controlling person liable". 386 F.2d at 738. On the other hand, our Court of Appeals, in speaking of the liability of directors under this section, has stated that "[t]he intent of Congress in adding this section ... was obviously to impose liability only on those directors who fall within its definition of control and who are in some meaningful sense culpable participants in the fraud perpetrated by controlled persons." (Emphasis supplied). Lanza v. Drexel & Co., supra, at 1299. The paucity of guidance in this area has been noted by Judge Tyler in S.E.C. v. Lum's, Inc., supra: "[i]n general, courts have held a corporation-issuer liable on agency principles for what can be deemed the corporate acts of its principal agents without much discussion ..." He went on, however, to find this "an appropriate analysis ... because it is difficult to conceive of a corporation acting in any other way than by its managing officers and directors."

Without quarrelling with the foregoing observation, I

wish to note two facts at the outset. First, Burr ceased being Elpac's president on August 7, 1968, although he continued to be a director. Although some of his misrepresentations were made before this date, still others were made later. In particular, his telegram to Gordon of August 20, signed "Robert L. Burr Elpac Inc." could not have been a statement by Elpac. Much more importantly, I do not consider any of Burr's activities to be corporate acts. He was selling his own stock, not Elpac's. There was some testimony[12/] at the trial that Burr had stated at the June meeting that the proceeds of the sale of the shares would be used to pay off an Elpac bank loan that Burr had cosigned. But the record contains not the remotest indication of the use to which the money was ultimately to be put.

Nor does the record contain any evidence that Elpac participated in or indeed knew anything of Burr's fraudulent acts. It is not even entirely clear whether or not the Elpac board ever authorized registration rights for the stock Burr sold. Despite the representation in Burr's telegram, no corporate minutes were introduced in evidence to substantiate this claim. The extent of Elpac's involvement in this transaction appears to have been the purely ministerial act of transferring some of Burr's shares on the books of its transfer agent.

The question of Elpac's liability is a difficult one largely because plaintiff has failed to introduce any greater evidence of Elpac's involvement than the fact that Burr was for a time Elpac's president. If I were to find Elpac liable, it

would be on this fact alone, and I am unwilling to reach such a conclusion. My refusal to hold Elpac liable here is less a reflection on Elpac's role than a comment on the exceedingly meagre state of the record. Before a defendant is required to meet its burden of good faith under § 20(a), plaintiff must make a prima facie showing that the defendant in some meaningful sense "controlled" the actions of one liable under § 10(b). I find no evidence in this record of control, direct or indirect of Burr by Elpac in what were clearly not corporate acts. I therefore hold that Elpac is not liable under § 20(a).

IV.

§ 29(b) of the Securities Exchange Act, 15 U.S.C. § 78cc(b), provides, in pertinent part, that "[e]very contract made in violation of any provision of this title or of any rule or regulation thereunder ... shall be void." Rescission is therefore available as a remedy for those defrauded under any of the provisions of the 1934 Act. Myzel v. Fields, supra; Estate Counselling Service v. Merrill Lynch, Pierce, Fenner & Smith, 303 F.2d 527 (10th Cir. 1962); Adelman v. CGS Scientific Corp., 332 F.Supp. 137 (E.D.Pa. 1971); John R. Lewis, Inc. v. Newman, 446 F.2d 800 (5th Cir. 1971). As I have already noted, plaintiff at the close of the trial elected rescission, although his complaint requested both rescission and damages in the alternative. This election was, furthermore, implicit in his conduct of the trial, for no evidence was submitted on the question of damages under any standard by which they might be computed.[13/]

The only obstacle to plaintiff's invocation of rescission is the defense of laches which the defendants assert.[14/] Although at least one court appears to have held the defense unavailable in actions under the 1934 Act, see Myzel v. Fields, supra, at 742, the majority of courts have permitted it. Royal Air Properties v. Smith, 312 F.2d 210 (9th Cir. 1962); Guarantee Insurance Agency v. Mid Continental Realty Corp., 57 F.R.D. 555 (N.D.Ill. 1972); Shapiro v. Schwamm, 279 F.Supp. 798 (S.D.N.Y. 1968). To invoke the defense, the defendant must demonstrate: (a) a lack of diligence on the part of the plaintiff and (b) prejudice to the defendant resulting from the delay. Hecht v. Harris, Upham & Co., 430 F.2d 1202 (9th Cir. 1970). In practice, the two criteria have been inseparable. That is, the prejudice flows from the delay by the usually precipitous decline in the value of the stock which the defrauded buyer now seeks to return. Hence the policy behind the defense of laches was well stated in Royal Air Properties v. Smith, supra: "[t]he purpose of the Securities Exchange Act is to protect the innocent investor, not one who loses his innocence and then waits to see how his investment turns out before he decides to invoke the provisions of the Act." By way of illustration, in Baumel v. Rosen, 412 F.2d 571 (4th Cir. 1969), cert. denied, 396 U.S. 1037 (1970), rescission was refused a plaintiff who waited 18 months between the discovery of the fraud and the renunciation of the sale.

Defendants premise their defense of laches on the interval between March, 1969, plaintiff's discovery of the fraud, and

April, 1971, the time when the instant suit was initiated. That is not, however, the relevant interval for purposes of determining plaintiff's entitlement to rescission. Rather, the court in assessing the diligence with which this matter has been pursued must look to the lapse of time between the discovery of the fraud and plaintiff's initial efforts to tender his shares or disclaim the sale. In the instant case very little time elapsed between these two occurrences. As soon as Gordon discovered that of the original group only he had purchased Elpac, he contacted Mann, who was his link with Lord. He asked Mann's help in getting in touch with Lord and in getting his money back. He finally succeeded in contacting Lord in June or July, 1969 and demanded that Lord help return his money. Lord proffered a few vague assurances and said that he would do everything he could. The plaintiff evidently never heard from Lord again and was unable to reach Burr, who was by that time neither a director or an officer of Elpac. He was in continuous contact with Mann, however, who told him that Lord was making some efforts to regain Gordon's investment. Gordon first sought the advice of counsel in late 1969, but the attorney whom he consulted, Stanley Jacobson, was unwilling to represent him in a lawsuit against a brokerage firm. During 1970 Gordon continued to invoke Mann's assistance in an effort to rescind the sale without bringing suit. The instant action was, as has been noted, commenced in April, 1971.

The foregoing establishes to my satisfaction that the defense of laches is inapplicable. Plaintiff acted immediately

to undo the transaction; nothing in the record suggests that he sat back to observe the fortunes of Elpac before seeking rescission. Any delay in the commencement of litigation appears to have been occasioned by plaintiff's efforts to resolve the controversy informally. Such a delay will not negate plaintiff's right to seek rescission. See In re Cohen's Will, 51 F.R.D. 167 (S.D.N.Y. 1970).

V.

The defendants have raised one other defense which merits brief consideration. Upon cross-examination Gordon admitted that he had contributed only $30,000 toward the purchase of the stock, and that the remaining $15,000 had been contributed by four other individuals. Lord was aware of this arrangement, and the four purchasers agreed that all the shares be received in Gordon's name. Gordon thus still possesses a certificate for 4,500 shares of Elpac stock in which the other purchasers have a one-third interest. Defendants therefore contend that plaintiff is not the "real party in interest" with respect to this portion of the stock and that Gordon can only maintain an action based on the 3,000 shares he owns. This contention is refuted by the plain language of Rule 17(a) of the Federal Rules,[15/] which provides that "a party with whom or in whose name a contract has been made for the benefit of another ... may sue in his own name without joining with him the party for whose benefit the action is brought." In Bache & Co. v. International Controls Corp., 324 F.Supp. 998 (S.D.N.Y. 1971), a brokerage firm brought suit against a tender offeror for failure to accept plaintiff's tender

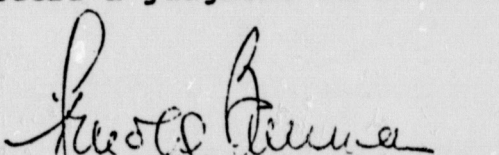
of securities. Of the shares tendered, approximately 9,000 belonged to the firm and approximately 21,000 to its customers, and the defendants argued that plaintiff could not obtain a recovery for its customers' shares. The court rejected this contention, citing Rule 17(a) and holding, inter alia, that as the party in whose name the contract was made, the firm could properly bring the action on its customers' behalf. See Edward B. Marks Music Corp. v. Jerry Vogel Music Co., 140 F.2d 268 (2nd Cir. 1944). Accordingly, I find defendants' contention to be meritless. 46a

## Conclusion

To summarize, plaintiff is entitled to rescission of his purchase of 4,500 shares against Burr, the seller. The action is dismissed as to Lord and P.A.W. because plaintiff, having chosen rescission, states no claim against either of these defendants. The action against Elpac is dismissed on the merits.

The parties are directed to settle a judgment on notice.

Dated: November 13, 1973



U. S. D. J.

1/
Burr was president of Elpac until August 7, 1968, and remained a director through February 1, 1969.

2/
The Statement of Transferee (plaintiff's Exhibit 1) reads, in pertinent part, as follows:

> "The undersigned intends to purchase 4,500 shares of common stock of ELPAC, Inc., from Robert L. Burr at a price of $12.00 and makes the following statements:
>
> (1) I have received from the issuer and/or the transferor a recent financial statement of the issuer and such additional information with respect to the issuer as I have deemed necessary to make an independent evaluation of the business prospects of the issuer and the fairness of the investment. ( x ) Yes ( ) No
>
> * * *
>
> (5) (a) The names of officers or directors of issuer whom I have known, the length of time I have known them and the nature of my prior business dealings with any of them are set forth below:
>
> None
>
> (b) My recent business experience is summarized briefly below:
>
> Public Accountant
>
> (c) My prior investment experience in business of a similar size and nature of ELPAC, Inc., is summarized below:
>
> Various investments of all kind, at different times over past 10 years.
>
> * * *
>
> I understand that I am making these statements for the purposes of evaluation by the Division of Corporations of the State of California and that the Division may rely on these statements in lieu of independent examination in determining whether or not the transfer of the securities of ELPAC, Inc., to me is fair, just and equitable."

3/ The letter to Burr (plaintiff's Exhibit 2) reads in full as follows:

"Mr. Robert L. Burr
c/o Elpac, Inc.
18651 Von Karman Avenue
Irvine, California 92664

Dear Sir:

The undersigned hereby agrees to purchase from you 4,500 shares of Common Stock (the 'Shares') of Elpac, Inc. (the 'Company') at $12 per share.

In order to induce the undersigned to purchase the Shares you have made the following representations and warranties to the undersigned:

(a) that the Shares are owned by you, free and clear of all liens, encumbrances, or charges whatsoever;

(b) that the Company is a corporation duly organized, validly existing and in good standing under the laws of the State of California;

(c) that the financial statements of the Company as of Mar. 31, 1968 heretofore delivered to the undersigned are true and correct and properly set forth the financial condition of the Company as of such date;

(d) that there has been no material adverse change in the business operations or financial condition of the Company since the date of the financial statements set forth in the immediately preceding paragraph;

(e) that you do not know of any fact or state of facts which could have a material adverse effect on the Company, its business or operations; and

(f) that no consent of any person or government agency is required as a condition precedent to the sale of the Shares, except the consent of the Commission of Corporations of the State of California.

The undersigned hereby acknowledges and agrees that the Shares are being acquired by the undersigned for his sole account for investment,and not with a view towards the resale or public distribution thereof, and that such Shares will not be sold or transferred except in accordance with the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder; and the undersigned further agrees that a legend to the

foregoing effect may be imprinted on any certificate for Shares delivered to him pursuant to this agreement.

The undersigned agrees to execute such documents as may be reasonably required in order to obtain the approval of the Commissioner of Corporations of the State of California to the transactions contemplated hereby; and the consent of such Commissioner is a condition precedent to the obligations of you and the undersigned. In the event that such consent is not obtained within 21 days from the date hereof, the undersigned shall have the right to terminate this agreement and its obligations hereunder by sending you written notice to the address first above written.

You agree to cause the Company to deliver to the undersigned an agreement or statement in form and substance satisfactory to the undersigned agreeing to include the Shares in the next registration statement filed by the Company with the Securities and Exchange Commission. The receipt by the undersigned of such agreement or statement within 14 days from the date hereof shall be a condition precedent to the obligations of the undersigned hereunder.

The closing of the transactions contemplated hereby shall take place at the offices of Steinberg & Pokoik, 575 Madison Avenue, New York, N.Y. on Aug. 5, 1968. At such time, the undersigned will make payment for the Shares against the delivery thereof.

If the foregoing correctly sets forth your understanding, will you kindly acknowledge agreement to the terms and conditions set forth herein by signing at the place indicated and returning the same to the undersigned.

Very truly yours,

(Signed) Irving Gordon

AGREED AND ACCEPTED:

Robert L. Burr"

It is Gordon's testimony that when he executed the letter, the number of shares was omitted from the first sentence of the letter. He concedes however that it was understood that he would purchase 4,500 shares.

4/ There is evidence, however, that the Diebold Technology Venture Fund, Inc.purchased 20,000 shares of Burr's stock at $12 per share

in the latter part of 1968. (Plaintiff's Exhibit 7). Indeed, the Commissioner of Corporations of the State of California authorized the sales to Diebold and to Gordon simultaneously on October 21, 1968. There is no evidence, however, that the Drebold transaction was in any way related to the transaction proposed to the group that met at Steinberg and Pokoik in June, 1968.

5/ 15 U.S.C. § 78t:

> "(a) Every person who, directly or indirectly, controls any person liable under any provision of this chapter or of any rule or regulation thereunder shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person acted in good faith and did not directly or indirectly induce the act or acts constituting the violation or cause of action.
>
> (b) It shall be unlawful for any person, directly or indirectly, to do any act or thing which it would be unlawful for such person to do under the provisions of this chapter or any rule or regulation thereunder through or by means of any other person.
>
> (c) It shall be unlawful for any director or officer of, or any owner of any securities issued by, any issuer required to file any document, report, or information under this chapter or any rule or regulation thereunder without just cause to hinder, delay, or obstruct the making or filing of any such document, report, or information."

6/ Note, "Reliance under Rule 10b-5: Is the 'Reasonable Investor' Reasonable?" 72 Columbia L.Rev. 562 (1972).

7/ The Second Circuit's test, it is argued, "does not examine those matters unique to the specific case that may have rendered the plaintiff-investor's reliance in the given factual situation any more or less reasonable than that of the 'reasonable investor.'" 72 Columbia L.Rev. at 567.

8/ The characterization is Lord's (Tr. 204), and nothing in the record contradicts it.

9/ A similar argument seems to have been advanced in Moerman v. Zipco, Inc., supra, where a defendant (Nasser) contended that Moerman, the plaintiff, had relied not on his statements but rather those of a third party, Blum. The court recognized that plaintiff may indeed have relied on Blum "to some degree", but also observed

that "[n]evertheless, Moerman insisted on talking with Nasser before acting." 302 F.Supp. at 446. The court then found Nasser liable under § 10(b) because he either confirmed Blum's misstatements or made no effort to correct the erroneous impression he knew Moerman had received. The same reasoning applies here a fortiori: Gordon consulted Lord and Burr at every juncture where action was required, and it was clearly their statements, not Mann's, that prompted those actions most directly.

10/
See, e.g., Myzel v. Fields, supra; Richardson v. MacArthur, 451 F.2d 35 (10th Cir. 1971); Hecht v. Harris, Upham & Co., 430 F.2d 1202 (9th Cir. 1970).

11/
The burden of proving good faith rests on the defendant. See Ruder, supra, at p. 602. See also, S.E.C. v. First Securities Co. of Chicago, 463 F.2d 981 (7th Cir. 1972), cert. denied, 409 U.S. 880 (1972). In that case the Seventh Circuit reversed a trial court's approval of a special master's report which concluded that the S.E.C. had failed to demonstrate the brokerage firm' bad faith. The court noted that "the district judge gravely misapprehended the operation of § 20(a)." 463 F.2d at 987.

12/
Testimony of Stuart Steinberg, Jr. (Tr. 167-168).

13/
For an illustration of the differing theories under which damages have been awarded a defrauded buyer in this circuit and elsewhere, compare Levine v. Seilon, Inc., 439 F.2d 328 (2nd Cir. 1971) and Janigan v. Taylor, 344 F.2d 781 (1st Cir. 1965) (out of pocket rule) with Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2nd Cir. 1970) and Ross v. Licht, 263 F.Supp. 395 (S.D.N.Y. 1967) (difference between purchase price and subsequent resale price).

14/
At the close of the plaintiff's case, defendants Lord, P.A.W. and Elpac moved to amend their answers to include the defenses of laches and absence of real party in interest. (Burr had previously interposed these defenses in his answer.) Because the equitable relief does not run against any defendant but Burr, the others have no standing to raise the equitable defense of laches. The motion is in other respects deemed granted. See F.R.C.P. 15(b).

15/
F.R.C.P. 17(a):

> "Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another,

or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought; and when a statute of the United States so provides, an action for the use or benefit of another shall be brought in the name of the United States."

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

FILED
DEC 11 1973
S. D. OF N. Y.

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN, INC. (sued herein as PHILLIPS, APPEL and WALDEN),

Defendants.

71 Civ. 1285 AB

J U D G M E N T

MICROFILMED
DEC 18 1973

The issues in the above entitled action having been brought on regularly for trial before the Honorable Arnold Bauman, District Judge, and at the conclusion of the evidence, the Court having reserved decision, and the Court thereafter on November 13, 1973, having handed down its opinion, constituting its findings of fact and conclusions of law, which opinion was filed in the Office of the Clerk of this Court on November 14, 1973, it is

ORDERED, ADJUDGED AND DECREED: That the sale of 4,500 shares of stock of Elpac, Inc., made by the Defendant Robert L. Burr to the Plaintiff Irving Gordon for the sum of $45,000 be, and the same is hereby rescinded ~~with respect to Defendant Robert L. Burr~~; and it is further

ORDERED, ADJUDGED AND DECREED: That the Defendant Robert L. Burr pay to the Plaintiff Irving Gordon the sum of $45,000 by cash or certified check with ~~interest from August 22, 1968,~~ against the concurrent delivery of the said 4,500 shares of Elpac Inc. stock at the office of Plaintiff's attorney, Leonard Loewinthan, Esq., 1 East 57th Street, New York, New York on the 21 day of January, 1974; and it is further

~~ORDERED, ADJUDGED AND DECREED: That in the event said Defendant Robert L. Burr does not make the said payment at the time and place aforesaid, that Plaintiff shall recover of the said Defendant the sum of~~

[illegible], together with interest from August 22, 1968, and the costs and disbursements of this action; and it is further

ORDERED, ADJUDGED, AND DECREED: That the complaint against the Defendant Elpac Inc. be and the same is hereby dismissed on the merits without costs; and it is further

ORDERED, ADJUDGED AND DECREED: That as to the Defendant Arnold Lord, the action is dismissed ~~without prejudice~~ and without costs inasmuch as Plaintiff has stated no claim against said Defendant; and it is further

ORDERED, ADJUDGED AND DECREED: That as to the Defendant Philips, Appel & Walden, Inc. (sued herein as Phillips, Appel & Walden), the action is dismissed ~~without prejudice~~ and without costs inasmuch as plaintiff has stated no claim against said Defendant.

Dated: New York, New York
December 10, 1973

Arnold Bauman
U.S.D.J.

JUDGMENT ENTERED DEC 12 1973

Raymond F. Burghardt
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC. (sued herein as PHILLIPS, APPEL and WALDEN),

Defendants.

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Index No. 71 Civ. 1285 AB

NOTICE OF ENTRY

S I R :

PLEASE TAKE NOTICE that the within is a true copy of a JUDGMENT duly entered in the within named court on December 12, 1973.

Dated: December 14, 1973

Yours, etc.

BRESSLER, MEISLIN, TAUBER & LIPSITZ
Attorneys for Philips, Appel & Walden, Inc.
Office and P.O. Address
90 Broad Street
New York, New York 10004

TO: Leonard Loewinthan, Esq.
1 East 57th Street
New York, New York 10022

Butowsky, Schwenke & Devine, Esqs.
230 Park Avenue
New York, New York 10017

Rogers & Cooper, Esqs.
60 East 42nd Street
New York, New York 10017

Balterman & Geist, Esqs.
10 East 40th Street
New York, New York 10016

**NOTICE OF MOTION TO VACATE JUDGMENT**
**(Filed December 20, 1973)**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

71 Civ. 1285

NOTICE OF MOTION TO VACATE JUDGMENT

---

S I R S :

PLEASE TAKE NOTICE, upon the annexed affidavit of LEONARD LOEWINTHAN, sworn to the 20th day of December, 1973, and the pleadings and proceedings heretofore had herein, plaintiff will move this Court, The Honorable Arnold Bauman, United States District Judge, on the 9th day of January, 1974, at 9:30 A.M., Room 1506, United States District Courthouse, Foley Square, New York, New York, pursuant to the Federal Rules of Civil Procedure, Rules 59(a), 60(b)(1) and 60(b)(6), and the general power of the Court to correct error and/or injustice, for an order setting aside the judgment entered herein on the 12th day of December, 1973 and (1) amending or making new findings of fact and conclusions of law on the grounds that the findings of fact, conclusions of law and judgment are erroneous; or (2) in the alternative, granting a partial new trial (or taking additional testimony) limited to the issue of plaintiff's damages, and for such other and further relief as the Court may deem just, equitable and proper.

Dated: New York, New York
December 20, 1973

Yours, etc.

Leonard Loewinthan

LEONARD LOEWINTHAN
Attorney for Plaintiff
Office & P.O. Address
1 East 57th Street
New York, New York 10022

TO: ROGERS & COOPER, ESQS.
Attorneys for Defendant Burr
60 East 42nd Street, Suite 1814
New York, New York

BALTERMAN & GEIST, ESQS.
Attorneys for Defendant Elpac, Inc.
10 East 40th Street
New York, New York

BUTOWSKY, SCHWENKE & DEVINE, ESQS.
Attorneys for Defendant Lord
230 Park Avenue
New York, New York

BRESSLER, MEISLIN, TAUBER & LIPSITZ, ESQS.
Attorneys for Defendant Phillips, Appel & Walden
90 Broad Street
New York, New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

: AFFIDAVIT IN SUPPORT OF MOTION TO VACATE

----------X

STATE OF NEW YORK )
COUNTY OF NEW YORK ) ss.:

LEONARD LOEWINTHAN, being duly sworn, deposes and says:

I am counsel for plaintiff and submit this affidavit in support of plaintiff's motion to vacate the judgment and (1) to amend or make new findings of fact and conclusions of law; or (2) in the alternative, for a partial new trial (or to take additional testimony) on the issue of plaintiff's damages.

The complaint herein sought rescission and in the alternative, damages against the four defendants. At the trial plaintiff requested rescission of the sale of Elpac stock (trial transcript p. 261). The court's opinion referred to this decision as an election or choice of remedy "which is available only against Burr, the seller of securities", (opinion p. 8).

I respectfully submit that the Court's opinion misinterprets the equitable remedy of rescission insofar as wrongdoers who are not parties to the contract, are concerned.

Only plaintiff and defendant Burr were parties to the contract of sale. Defendants Lord and Phillips, Appel & Walden (P.A.W.) were third persons who procured the sale through improper actions. It is my understanding of the Law of rescission and election of inconsistent remedies that such third persons are not released by an election for rescission, but they

remain liable for any part of the sale price which is not recovered or collected from Burr. In other words, if Burr fails to make full restitution, Lord and P.A.W. must pay the balance.

The law in this regard is set forth in Point I in the annexed memorandum of law.

Plaintiff's request for rescission was based on my above understanding of the law of rescission. If I erred in my understanding of the applicable law then I respectfully request the court to open the judgment and permit plaintiff to furnish additional testimony on the issue of plaintiff's damages (i.e. the value of Elpac stock in March, 1969 when the fraud was discovered). With such testimony added to the record plaintiff will seek damages against Defendants Lord, P.A.W. and Burr, in lieu of rescission.

In view of the court's findings of fact with respect to Lord's and P.A.W.'s wrongful actions, justice would require such relief (see Point II of plaintiff's annexed memorandum of law).

WHEREFORE, I respectfully request plaintiff's motion be granted.

Leonard Loewinthan

LEONARD LOEWINTHAN

Sworn to before me this
20th day of December, 1973.

HERMAN HAIMES
Notary Public, State of New York
No. 31-6727540
Qualified in New York County
Term Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT FILED JAN 21 1974 S.D. OF N.Y.

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILIPS, APPEL & WALDEN, INC. (sued herein as PHILLIPS, APPEL & WALDEN),

Defendants.

AFFIDAVIT

Civil Action No.: 71-1285 AB

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

NEIL M. BERSON, being duly sworn, deposes and says:

1. I am an attorney associated in the practice of law with the firm of Bressler, Meislin, Tauber & Lipsitz, the attorneys for defendant, Philips, Appel & Walden, Inc. I submit this affidavit in opposition to plaintiff's motion to set aside the judgment under Rules 60(b)(1) and (6) of the Federal Rules of Civil Procedure, or, in the alternative, for a partial new trial on the issue of damages under Rule 59a of those rules.

2. This action was tried before the Court without a jury on April 11th and 12th, 1973. On November 13, 1973, the Court rendered its Opinion awarding plaintiff the remedy of rescission against defendant Robert L. Burr, and dismissed the action against the other defendants. Judgment was entered in accordance with the Opinion on December 12, 1973.

3. Accompanying this Affidavit is the Memorandum of Law on behalf of Philips, Appel & Walden, Inc. in opposition to plaintiff's motion. Defendant Philips, Appel & Walden, Inc. relies solely on its Memorandum which sets forth all of the relevant facts and reasons why plaintiff's motion should be denied.

WHEREFORE, defendant Philips, Appel & Walden, Inc. respectfully requests that plaintiff's motion be denied in all respects, and for such other, further and different relief as the Court may deem just and proper.

Neil M. Berson

NEIL M. BERSON

Sworn to before me this

day of January, 1974.

Alan Plotkin

Notary Public

ALAN PLOTKIN
Notary Public, State of New York
No. 31-7113125
Qualified in New York County
Commission Expires March 30, 1975

AFFIDAVIT OF SERVICE BY MAIL

61a-1

Index No.
71 Civ. 1285 AB

STATE OF NEW YORK )
: ss.:
COUNTY OF NEW YORK )

DOROTHY FARBER, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years old and on the 18th day of January, 1974 deponent served the annexed Affidavit on the attorney for defendant ELPAC, INC., HARRY BALTERMAN, ESQ., 10 East 40th Street, New York, New York 10017, and on the attorney for defendant ROBERT L. BURR, MILTON COOPER, ESQ., 60 East 42nd Street, New York, New York 10017, by depositing a true copy of same in postpaid properly addressed wrappers to the respective attorneys in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Dorothy Farber

Sworn to before me this
18th day of January, 1974.

ALAN PLOTKIN
Notary Public, State of New York
No. 31-3118185
Qualified in New York County
Commission Expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - -x

IRVING GORDON,

Plaintiff, 71 Civ. 1285 AB

-against- AFFIDAVIT

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

- - - - - - - - - - - - - - - - - - - - - - -x

STATE OF NEW YORK )
) SS.:
COUNTY OF NEW YORK )

HARRY BALTERMAN, being duly sworn, deposes and says:

1. I am the successor to Balterman & Geist, the attorneys for Defendant, Elpac, Inc. ("Elpac") and make this affidavit in connection with Plaintiff's Motion to Vacate the Judgment herein and for the other relief requested in his Notice of Motion.

2. Both the affidavit in support of Plaintiff's Motion submitted by Mr. Loewinthan and Plaintiff's memorandum in support of his motion make it clear that Plaintiff is not seeking any relief against Elpac.

3. Thus, the affidavit in support of the motion avers that:

(a)"Defendants Lord and Phillips, Appel & Walden (PAW.) were third persons who procured the sale through improper actions.*** In other words, if Burr fails to make full restitution, Lord and PAW. must pay the balance."

(b)"With such testimony added to the record plaintiff will seek damages against Defendants Lord, P.A.W. and Burr, in lieu of rescission."

4.(a) Similarly, the very first sentence of Plaintiff's

memorandum states "This brief assumes, in accordance with Judge Bauman's opinion, that defendant Elpac is not liable to plaintiff."

(b) Also, similarly, the memorandum, when read in its entirety, makes it evident that Plaintiff's Motion only seeks relief against Defendants, Lord and P.A.W.

5. In view of the aforegoing, Elpac takes no position in connection with Plaintiff's Motion except that it respectfully requests that in the event the Court is disposed to grant any part of Plaintiff's application, any order entered in connection therewith by the Court should not affect the judgment of dismissal of the complaint herein against Elpac.

Sworn to before me this
4th day of January, 1974.

S/ HARRY BALTERMAN
Harry Balterman

LAURIE RUBEN
Notary Public, State of New York
No. 31-5197395
Qualified in New York County
Commission Expires March 30, 1974

## MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT DENYING MOTION TO VACATE JUDGMENT (Filed May 2, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IRVING GORDON,

Plaintiff,

-against-

MEMORANDUM

71 Civ. 1285

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN,

Defendants.

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BAUMAN, D. J.

Plaintiff has moved, pursuant to Rules 59(a) and 60(b) of the Federal Rules of Civil Procedure, for an order amending the judgment previously entered in the instant action or, alternatively, for an order granting a partial new trial. Two of the defendants, Lord and Phillips, Appel & Walden ("P.A.W.") have appeared in opposition to the motion, and two others, Burr and Elpac, Inc., have not. For the reasons that follow, the motion is denied.

In the opinion filed November 13, 1973, 366 F.Supp. 156 (S.D.N.Y. 1973), I ordered rescission of plaintiff's purchase of 4,500 shares of Elpac stock from Burr. 366 F.Supp. at 172. During the course of the opinion I noted that plaintiff had deliberately elected the remedy of rescission at the close of the trial, and that this remedy was available only against Burr, the seller of securities. Although I had concluded that both Lord

and P.A.W had committed violations of the Securities Exchange Act of 1934, I dismissed the action as against these two defendants because plaintiff, having chosen rescission, stated no claim against them. It is this exoneration of Lord and P.A.W. that plaintiff now contests. He asks this court to amend the judgment previously entered so as to hold Lord and P.A.W. liable for so much of the $45,000 purchase price as he is unable to recover from Burr. Alternatively, he seeks a partial new trial at which he might present evidence on the issue of damages and thus obtain a money judgment against Lord and P.A.W.

In support of the first branch of his motion, plaintiff argues that his choice of rescission does not defeat his right to recover damages so long as he has failed to obtain full redress on the rescission claim. The general rule, of course, is that one fraudulently induced to enter a contract may either affirm the contract and sue for damages or rescind and sue for what he has paid out on it. But the two remedies, it is said, are inconsistent, and the election of one necessarily rejects the other: for a sale cannot be valid and void simultaneously. Estate Counseling Service v. Merrill Lynch, Pierce, Fenner & Smith, 303 F.2d 527 (10th Cir. 1962); Chiodo v. General Waterworks Corporation, 380 F.2d 860 (10th Cir. 1967); United Forest Products Co. v. Baxter, 452 F.2d 11 (8th Cir. 1971); Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F.2d 106 (9th Cir. 1960); Sherman v. Jacobson, 247 F.Supp. 261 (S.D.N.Y. 1965); Bostwick v. Cohen, 319 F.Supp. 875 (N.D. Ohio 1970); Falls Sand and Gravel Co. v. Western Concrete, Inc., 270 F.Supp. 495 (D.Mont. 1967).

On the other hand, the doctrine of election of remedies was long ago criticized as a harsh one. Friederichsen v. Renard, 247 U.S. 207 (1918), and it has been the subject of cogent criticism in 5A Corbin on Contracts § 1223. It was there stated that "there is no necessary inconsistency between these two remedies [rescission and damages]; and the real purpose served by not granting both at once is to avoid double compensation for one injury.... The supposed necessity of 'election' between these two judicial remedies should by no means be permitted to hamstring the injured buyer in his own efforts to mitigate his loss, or to 'entrap' the innocent to the enrichment of the guilty." Accordingly, it is now well established that choice of a remedy which proves unavailable does not constitute an election, and will not bar the pursuit of an effective remedy. In other words, in order for an election to be conclusive, both remedies must in fact be available to the plaintiff. Henderson Tire and Rubber Co. v. Gregory, 16 F.2d 589 (8th Cir. 1926); Kuhl v. Hayes, 212 F.2d 37 (10th Cir. 1954); Sears Roebuck & Co. v. Blade, 123 F.Supp. 131 (S.D.Cal. 1954); Morgan v. Hidden Splendor Mining Co., 155 F.Supp. 257 (D.Utah 1957); Rippey v. Denver United States National Bank, 273 F.Supp. 718 (D.Colo. 1967); Warren Company v. Neel, 284 F.Supp. 203 (W.D.Ark. 1968), affd., 406 F.2d 775 (8th Cir. 1969); Schenck v. State Line Telephone Co., 238 N.Y. 308 (1924).

Under the foregoing authorities, then, plaintiff could have obtained a judgment granting him rescission of the sale of stock or, in the alternative, awarding him damages against any

or all of the defendants found liable. That is not, however, precisely what plaintiff is seeking here. What he wants, in the first instance, is a judgment which would permit him to recover from the remaining two defendants so much of the $45,000 in rescissional damages[1/] that he is unable to recover from Burr. He thus appears to be seeking what amounts to an order of rescission against Lord and P.A.W.; since they were not sellers that is, of course, impossible.

Plaintiff seeks the precise relief I have described for one obvious reason. As I noted in my opinion, 366 F.Supp. at 170, he submitted "no evidence ... on the question of damages under any standard by which they might be computed." Thus plaintiff was granted the remedy of rescission exclusively not because he was precluded by the doctrine of election of remedies from seeking damages, but because on the record before me he was not entitled to any damages at all.

There is a further problem with granting plaintiff the relief he seeks. As I suggested in footnote 13 of my opinion, there is some question as to the applicable measure of damages. Levine v. Seilon, Inc., 439 F.2d 328 (2nd Cir. 1971), invokes the "out of pocket rule": "a defrauded buyer of securities is entitled to recover only the excess of what he paid over the value of what he got." Chasins v. Smith, Barney & Co., 438 F.2d 1167 (2nd Cir. 1970), states that the measure is the difference between the purchase price of the stock and the subsequent resale price. I do not suggest whether either of these standards, or

perhaps even another, is applicable here; at no point in this litigation have the parties briefed this issue. It is worth noting, though, that under any theory of damages plaintiff would be entitled to much less than the $45,000 he could obtain through rescission; indeed, under the "out of pocket rule" he might not be entitled to anything at all.[2/] Thus to permit plaintiff to recover from Lord and P.A.W. so much of the $45,000 that he is unable to retrieve from Burr would be to expose these two defendants to a judgment perhaps greater than that to which plaintiff might be entitled were he to prove damages.

In the preceding paragraph I have attempted to demonstrate the illogic of what might be termed plaintiff's contingent liability theory of rescission. That excursus was purely speculative, however, for on the present record he is not entitled to so much as one cent in damages against any of the defendants. It is obvious that he cannot be awarded an amended judgment permitting the recovery of the balance of the $45,000 from Lord and P.A.W. The question before me thus reduces itself to the second branch of plaintiff's application: shall he be permitted a partial new trial in which to present proof of damages?

A motion for a new trial pursuant to Rule 59(a)[3/] is directed to the sound discretion of the district court. Diapulse Corporation of America v. Birtcher Corporation, 362 F.2d 736 (2nd Cir. 1966); Urti v. Transport Commercial Corporation, 479 F.2d 766 (5th Cir. 1973). The case for exercising discretion in plaintiff's favor is singularly unpersuasive. Plaintiff had ample

opportunity to submit proof of damages at the trial; indeed, at one juncture (Tr. 56) I pointedly inquired whether he intended to offer such proof. Plaintiff's counsel stated that he would, but in fact did not, and at the conclusion of his case simply demanded rescission. Professor Moore has observed that "a new trial ... will not lie merely to relitigate old matter; nor will a new trial normally be granted to enable the movant to present his case under a different theory than he adopted at the former trial."[4/] Plaintiff deliberately ignored the court's invitation to offer proof of damages at the trial after having concluded that rescission afforded an adequate remedy. Now that he deems the remedy inadequate, he asks for permission to relitigate the matter. That I decline to grant.

Plaintiff has also moved for relief from judgment pursuant to Rule 60(b).[5/] He contends that it was his understanding of the law that a judgment for rescission of the sale was sufficient to bind all of the defendants, not merely the seller. Proceeding under that assumption, he declined to offer proof of damages. He now contends that this erroneous view of the law constitutes "mistake, inadvertence, surprise or excusable neglect" within the meaning of Rule 60(b)1 sufficient to warrant relief from the judgment previously entered. This contention cannot withstand serious scrutiny. In United States v. Erdoss, 440 F.2d 1221 (2nd Cir. 1971), our Court of Appeals stated:

> "The law in this circuit is reasonably clear when a conscious decision has been made by counsel, ignorance of the law 'is not the sort of excusable neglect contemplated by Federal Civil Rule 60(b),

28 U.S.C.A. as ground for vacating an adverse judgment.' Ohliger v. United States, 308 F.2d 667 (2nd Cir. 1962) (per curiam)."

The court went on to quote the language of Dal International Trading Co. v. Sword Line, Inc., 286 F.2d 523 (2nd Cir. 1961), which is equally applicable here: "[G]enerally a party who makes an informed choice will not be relieved of the consequences when it subsequently develops that the choice was unfortunate." See also Bershad v. McDonough, 469 F.2d 1333 (2nd Cir. 1972). Under the law of this circuit, then, plaintiff's misunderstanding of the law of rescission does not entitle him to relief pursuant to Rule 60(b).

For all of the reasons herein stated, plaintiff's motion for an amended judgment or, alternatively, for a partial new trial is denied.

IT IS SO ORDERED.

Dated: May 1, 1974

U. S. D. J.

## Footnotes

1/
Further explanation of this term can be found in Myzel v. Fields, 386 F.2d 718 at 741 (8th Cir. 1967), cert. denied, 390 U.S. 951 (1968).

2/
Plaintiff purchased the Elpac stock in August, 1968 at a price of $10 per share. It appears from the testimony adduced at trial (Tr. 79) that in July, 1968 Elpac was selling at $18 or $19 per share; in any event, it is clear that plaintiff bought the stock at a price substantially below the market price. This fact does not necessarily preclude some recovery under the "out of pocket rule," for the actual value of the stock could have been far lower than the market price. It means, though, that under the "out of pocket rule" plaintiff's damages were unlikely to approach $45,000.

3/
Rule 59(a):

> "(a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law, in the courts of the United States; and (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment."

4/
6A Moore's Federal Practice § 59.07.

5/
Rule 60(b) provides, in pertinent part:

> "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic

or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

TRANSCRIPT OF TRIAL BEFORE BAUMAN, D.J. ON APRIL 11 AND 12, 1973

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON

Plaintiff

vs. 71 Civ 1285

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD and PHILLIPS, APPEL & WALDEN

Defendants

----------X

April 11, 1973
10 a.m.

Before: HON. ARNOLD BAUMAN, D.J.

Appearances: Leonard Loewinthan, Esq.,
Atty for plaintiff

Rogers & Cooper
Attys for deft Burr
By: Milton Cooper, Esq.

Balterman & Geist
Attys for deft Elpac
By: Alan Geist, Esq.

Butowsky, Schwenke & Devine
Attys for deft Lord
By: Michael C. Devine, Esq.,
Alan Steinberg, Esq.

Bressler, Meisling, Tauber & Lipsitz
Attys for deft Phillips, Appel & Walden
By; Steven Lipsitz, Esq.
Neil Berson, Esq.

MR. DEVINE: Your Honor, Mr. Steinberg is associated with me. He is not a member of our firm, he is acting of counsel to our firm. He is a member of the bar of the District of Columbia and not in New York and not of this Court and I would move at this time that he be admitted as counsel to my firm for the purpose of this case, under, I think, Rule 36.

THE COURT: Motion granted; welcome.

Let us proceed.

MR. LOEWINTHAN: Your Honor, there is no jury here and I would not necessarily make an opening statement.

THE COURT: It is up to counsel.

MR. DEVINE: I believe defense counsel who join me would like to make a motion at the outset of trial.

Based upon what we believe to be an admitted fact, that the plaintiff is not the purchaser of a substantial portion of the shares that were issued and in suit, we feel that his complaint, therefore, should be dismissed at the outset because he is not a proper party in interest and because admissable and indispensible parties are not present, have not been served and do not know of the pendency of this action.

We feel this motion can be decided at the

outset because in the depositions which occurred, which concluded Monday of this week, the plaintiff did admit he is not the purchaser of at least 1500 of the 4500 shares which are involved in the action and, therefore, I believe I speak for all defense counsel, in making a motion at this time that the complaint be dismissed for those two reasons, namely, the first that the plaintiff is not the proper party in interest and second, there are indispensible parties that are not present.

THE COURT: I will hear you.

MR. LOEWINTHAN: If your Honor please, the testimony at the examination before trial brought out the fact that Mr. Gordon had paid 30,000 of the $45,000 of his own money for the purchase of the stock. The stock is in the name of Irving Gordon as an individual. He also testified he was the nominee of certain other persons who had pledged with him $15,000 of the $45,000, but that the stock was in his name to be voted by him if a vote were ever made and to be used by him.

They may have had a beneficiary interest in it but htey did not have any title to any partof that stock.

THE COURT: Decision reserved.

Proceed.

MR. LOEWINTHAN: Mr. Gordon, would you please take the stand.

IRVING GORDON, plaintiff, being called as a witness, having been first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. LOEWINTHAN:

Q Mr. Gordon, will you please tell us what occupation you are in?

A I am an accountant.

Q How long have you been an accountant?

A Over 20 years.

Q Are you now a certified public accountant?

A I am.

Q Do you know the defendants Lord and Burr?

A Yes.

Q When for the first time did you meet the defendant Lord?

A Soem time in June of 1968.

Q Where did that meeting take place?

A In Las Vegas.

Q Was Mr. Lord with another person at that time?

A He was.

Q What was the name of the other person?

A Howard Mann.

Q Do you know Mr. Mann?

A Yes.

Q For how long do you know Mr. Mann?

A Many, many years.

Q 20 years.

A Over 20.

Q Where did you meet Mr. Mann and Mr. Lord?

A I met them in the lobby of Caersar's Palace Hotel in Las Vegas.

Q What were you doing in Las Vegas?

A I went there to attend a wedding.

Q Did you have a conversation with Mr. Lord and with Mr. Mann in Caesar's Palace?

A I did.

Q Will you tell the Court what you said to them and what they said to you?

MR. LIPSITZ: Your Honor, I object on behalf of defendant Phillips Appel & Walden, to any conversations he had with third persons.

THE COURT: Overruled. I will take it.

Q The judge overruled the objection, you may answer.

A When I saw Mr. Mann in the lobby of Caesar's Palace I went up to him and asked him what he was doing there and he told me he had just come back from California inspecting the plant. I asked him what are you doing with a plant in California and he said he had purchased a piece of the stock of this corporation and he went there to inspect it. He then

He then introduced me to an individual by the name of Arnold Lord.

THE COURT: Would you repeat the last sentence?

(The sentence was read.)

Q Did Mr. Lord at that time tell you where he was employed?

A It came out in conversation that he was employed with Phillips, Appel and Walden.

Q Is that the Phillips Appel and Walden, Inc. that is the defendant in this action?

A Yes.

Q What was the name of the plant that Mr. Lord and Mr. Mann said that they had just visited?

A He went to visit the Elpac, E L P A C corporation plant.

Q Is Elpac one of the defendants in this action?

A Yes.

Q What did they say they were doing there?

THE COURT: To the best of your recollection, who said what?

A Mr. Mann told me he had just come from California to inspect the plant and he then introduced me to Mr. Lord and Mr. Lord, he told me that he had gotten the people together

and sold a piece to him and I asked him how does the deal look and he said it looks excellent. I said is there any possibility of me getting into the situation and he said he may be putting another package together very, very shortly and he can't promise me because it is a very, very hot thing and a lot of people are clamoring for it and I said okay, see what you can do and if you have anything available, let me know, and we said goodbye.

Q When you say that Mr. Lord said he was putting a package together, what do you mean by putting a package together?

A Mr. Lord sold a number, a quantity of shares of Elpac stock that was owned by Mr. Burr himself personally and these shares were being sold to individuals and on a package basis, say 20,000 shares at a time or 15,000 or 30,000 shares at a time in bulk at one shot.

MR. COOPER: I don't understand whether this was part of the conversation or not.

THE COURT: Was that said?

THE WITNESS: What was said was that a deal would be coming up without mentioning the number of shares and there may be a piece available for me.

THE COURT: What I am trying to find out, was it said to you in words or substance?

THE WITNESS: Yes.

THE COURT: Was it said to you in words or

substance that Mr. Lord was going at some later time to sell further shares of Mr. Burr's stock in Elpac?

THE WITNESS: Yes, he did.

Q Did you leave with Mr. Mann and Mr. Lord or did you leave the hotel alone?

A I left the hotel alone.

Q Where did you go from Las Vegas?

A I went home to New York City.

Q When did you next hear from either Mr. Mann or Mr. Lord.

A About a week or so, maybe a couple of days, I got a call from Howard Mann.

Q What did he say to you and what did you say to him?

A He said he spoke to Arnold Lord and Mr. Lord was getting another package or a number of shares ready and that he asked Mr. Lord to see if he could fit me in.

Q When did you next hear from Mr. Lord?

A Mr. Lord called me in a day or so after that conversation with Mr. Mann.

Q What did he say to you and what did you say to him?

A When he called me, he told me he had spoken to Howard and Howard asked him to please fit me into the next package or deal he was getting ready.

Q Was that the sum and substance of the entire conversation?

A I asked him when is it going to take place and he said it is going to take place in the near future and he told me he can't tell me right now exactly how many shares it is going to be, but there will be a piece for me.

Q When did this conversation take place?

A Sometime in June of 1968.

Q Did you hear from Mr. Lord again in June of 1968?

A Yes. He called me back a couple of days later or a week later and told me there was going to be a meeting being set up of all the parties that are interested in purchasing the shares of Elpac and that I should make myself available to attend a meeting.

I told him to give me a couple of hours so I could get to whatever place he designated.

Q Did he say it was for the sale of Elpac shares of stock?

A It was the sale of Elpac shares of stock.

Q Was that stock to be purchased from the corporation directly?

A No.

Q Who was it to be purchased from?

A Mr. Robert Burr.

THE COURT: Is that what he said to you or is that something you just figured out?

THE WITNESS: No. I found out about that when I attended the meeting.

THE COURT: I am interested in knowing what happened in the conversation in which Mr. Lord called you and said there was going to be a meeting of prospective buyers of Elpac stock; is that right?

THE WITNESS: That is correct, sir.

THE COURT: And that you were to be available, right?

THE WITNESS: Right.

THE COURT: In that telephone conversation, did he say whether they were corporate shares or Burr's shares?

THE WITNESS: No, he didn't.

Q Did he say how many shares there were for sale?

A He told me there were 4500 shares.

Q 4500 shares?

A For me, my share.

Q Did he tell you how many shares in toto he was going to sell?

A I believe he told me there were 20,000 total that would be totally pledged with my 4500.

THE COURT: That would be totally what?

THE WITNESS: Totally pledged. In other words, the group, the people he was bringing in would buy the total 20,000.

THE COURT: 4500 shares for you and 20,000 to be available?

Q Did he tell you the price of the shares?

A Not at that time.

Q When did you next hear from Mr. Lord?

A He called me back in a day or so and told me that the meeting --

Q Excuse me, was this in June of 1968?

A June of 1968.

Q Go ahead.

A He called me back in a day or so in June of 1968 and gave me an address, 575 Madison Avenue, a meeting would be held with all the potential customers.

Q Did you attend that meeting in June of 1968?

A I did.

Q Where was the meeting held?

A It was held in the office of Mr. Steinberg,Senior, his personal office at 575 Madison Avenue.

Q You say Mr. Steinberg,Senior. Is there a Mr. Steinberg, Junior ?

A Yes. That is Mr. Steinberg's son.

Q What is his full name?

A Stuart Steinberg.

Q Will you tell the Court who was present at that meeting in June of 1968 at the offices of Steinberg & Pokoik, 575 Madison Avenue?

MR. DEVINE: May I interrupt at this point and request if there are any witnesses which the plaintiff intends to call in the Courtroom, that they be excused.

THE COURT: Are there any witnesses in the Courtroom?

MR. LOEWINTHAN: No, sir.

THE COURT: Who was present at the meeting, was the last question.

A Mr. Steinberg, Senior, Mr. Steinberg, Junior, Mr. Burr, Mr. Lord and Mr. Greenberg and Mr. Adlman, myself, a gentleman by the name of Mr. Jacobson, who was an attorney and two gentlemen from Philadelphia, whose names I don't know.

Q Will you tell us who Mr. Stuart Steinberg was or is?

A Mr. Steinberg was a co-worker of Arnold Lord at Phillips, Appel & Walden and is a son of Mr. Steinberg, Senior.

Q Was Mr. Steinberg, Senior present at the meeting?

A Yes, he was.

Q Who is Mr. Adlman?

A Mr. Adlman was a co-worker or Mr. Lord and Mr. Stuart Steinberg at Phillips, Appel & Walden.

Q Who was Mr. Greenberg?

A Mr. Greenberg was introduced to me as a promotional man.

Q What do you mean by a promotional man?

A I think Mr. Lord told me that they brought Mr. Greenberg down so he could potentially be employed by Elpac to promote the corporation.

Q From that, did you understand that Mr. Greenberg was a native Californian or New Yorker?

A I really didn't know where he came from. I believed he had offices in New York.

Q Who was Mr. Jacobson?

A Mr. Jacobson was introduced to me as an attorney.

THE COURT: Whose, do you know?

THE WITNESS: I believe Mr. Steinberg, Senior brought him down to evaluate the deal and take charge.

THE COURT: What business was Mr. Steinberg, Senior in?

THE WITNESS: I believe he is in managemet of real estate or real estate.

THE COURT: The meeting took place at his office?

THE WITNESS: Yes.

Q Who were the two gentlemen from Philadelphia?

A I don't know who they were. I assumed they were invited by Mr. Lord.

Q Will you tell the Court as best as you can remember, what took place at that meeting?

A Mr. Jacobson asked many, many questions of Mr. Burr in terms of what requirements would be needed in order for him to allow his client to go into the deal and they requested that a certain format be laid down in terms of what he would have to get from Mr. Burr and from the California Commissioner of Corporations and the bank that had leant money to the corporation and Mr. Burr had hypothicated his stock with the bank to guarantee the loans of the corporation.

Mr. Jacobson had made certain conditions by which this deal would have to go through.

Q Do you remember what those conditions were?

A Yes.

Q Will you tell the Court as best as you can remember?

A Number one, Mr. Burr would have to procure the consent of the California Commissioner for the sale of the stock.

THE COURT: Which California Commissioner?

THE WITNESS: I believe it is the Commissioner that is in charge of the sale of any kind of a stock in

California.

MR. LOEWINTHAN: I think that is the Commissioner of Corporations.

THE COURT: I understand that he would have to get the consent of the California Securities Commissioner?

THE WITNESS: Yes.

A (Continuing) Number two, he would have to get the consent of Elpac and Number three, he would have to get consent from the bank. Number four, he would have to guarantee the purchasers that the stock would be registered not later than April 30, ~~1968~~. 1969

MR. DEVINE: I didn't hear that.

THE COURT: Read it.

(The answer was read.)

Q Will you tell the Court who Mr. Burr is or was at that time?

A Mr. Burr was the president of Elpac Corporation.

Q Was there any format set forth for the manner in which the sale of the stock was to take place?

A Mr. Burr and Mr. Lord made it very clear that they weren't looking to peddle a thousand shares at a time, that the total 20,000 shares is a package and would have to go otherwise they wouldn't be selling any part of it.

Q When the meeting finally broke up, will you tell the

Court what happened?

THE COURT: Was the price discussed at that meeting?

THE WITNESS: Yes, it was.

THE COURT: What was it?

THE WITNESS: Twelve dollars a share.

Q When the meeting broke up, tell the Court what happened?

A When the meeting broke up, we walked out of Mr. Steinberg's personal office and walked into a hall way, but this is still within his general offices but not in the hall way of the building and myself, Stuart Steinberg, Mr. Lord and Mr. Burr, and I believe Mr. Adlman was there too; the statement within the offices of Mr. Steinberg was how was the corporation doing at the time and Mr. Burr said that the corporation had turned its corner and now was going to make a profit and they had enough orders on hand that July will show a profit and the rest of the year, July, August, September, October, November will all be in the black and orders were coming in so they would have a profit backed up all through 1969. P218

MR. COOPER: Can we have the answer repeated? It is difficult to hear the witness.

THE COURT: Please keep your voice up and

face the counsel table.

Do I understand what you just said was said in the meeting before you went out into the hall?

THE WITNESS: If I didn't make myself clear -- first it was said that the corporation had turned around --

THE COURT: That was said in the meeting?

THE WITNESS: Yes.

THE COURT: Read the answer as you have it, please.

(The answer was read.)

THE COURT: You are back out in the hall. What happened in the hall?

A (Continuing) I then asked Mr. Burr and Mr. Lord if we can get some figures to see how the company is doing on a monthly basis and Mr. Burr promised to send me monthly unaudited figures that would be coming from the plant to show that there was a profit each month starting from the month of July, on.

Q Mr. Gordon, in connection with that answer, will you tell the Court when for the first time you saw a corporate statement of Elpac?

A I would say it came in the mail sometime possibly in the latter part of 1969.

Q What statement was that, for what period of time?

A I don't remember what period of time, but it was a

printed statement that came from the corporation.

THE COURT: Is that a yea[illegible]or the time we are talking about?

MR. LOEWINTHAN: That is right.

THE COURT: Do you want to fill in the blanks in the meantime; did he buy some stock?

MR. LOEWINTHAN: Yes.

Q After you had the talks in June of 1968, when was the next time you heard from either Mr. Lord or Mr. Mann?

A Mr. Lord called me about a week or so later and told me that everything was going along fine and that all the papers will soon be coming from California so that the deal would be able to be consumated.

THE COURT: You attended a meeting, right?

THE WITNESS: Yes.

THE COURT: You told me about that?

THE WITNESS: Yes.

THE COURT: Then within a week or so you say you got a call from Mr. Lord to the effect that the papers would be coming from California?

THE WITNESS: Right.

THE COURT: At some time did you say that you were going to buy? What were these papers about? Did you say you were going to buy the stock or what?

THE WITNESS: They were supposed to supply the consent form from the California Commission, they were supposed to get the letter from Mr. Burr.

THE COURT: Was there any discussion at all before this phone call to the effect that if these consents about which you told me were obtained, that you would then buy 4500 shares?

THE WITNESS: Definitely, he knew that.

THE COURT: When did you say that?

THE WITNESS: When we walked out of the office it was understood that if all these papers were forthcoming, the deal was okay.

Q This conversation with Mr. Lord in which he said he everything was going okay, this took place when?

MR. DEVINE: I object to the question.

THE COURT: Let me hear it, please.

MR. DEVINE: To the extent that it includes in the question that Mr. Lord said everything was okay. I don't think we have had any testimony to that effect.

THE COURT: The testimony we have had is that Mr. Lord called him up and said everything was fine and the papers were coming from California.

MR. DEVINE: Objection withdrawn. I did not hear that.

Q When did you hear from him for the next time?

A From Mr. Lord?

Q From Mr. Lord, yes.

A In about a week or two after that.

Q What month of 1968?

A Somewhere in July.

Q What did he say to you and what did you say to him at this next conversation, telephone conversation?

A He told me I had to come down to his office to sign certain papers.

Q Did you go to his office?

A A short time thereafter I went to his office.

Q Would you remember the date that you went to his office?

A July 18, 1968.

Q Who was present in the office?

A Mr. Lord and another gentleman by the name of Mr. James.

Q Where did this meeting take place?

A At the office of Phillips, Appel & Walden.

Q Was that the uptown office or the downtown office?

A I believe it is on 37th and 7th Avenue.

Q Will you tell the Court to the best of your recollection

what took place at that meeting?

A I came to the offices of Phillips, Appel & Walden and went downstairs, directed downstairs by somebody who had told me that Mr. Lord's office was downstairs. I found Mr. Lord, came in and Mr. Lord had some papers --

THE COURT: Was Mr. James there at this time?

THE WITNESS: Yes, I believe he was.

A Mr. Lord took some papers out of his desk and asked me to sign it. I asked him what were the papers for and he said it was routine in transactions of this nature, that you have to sign these types of letters.

I sign the letters and before I left, he called down a gentleman from Phillips, Appel who wasn't in his office at the time and the gentleman notarized my signature.

Q Do you remember the name of that gentleman?

A No, I don't.

Q I show you a paper marked "Statement of Transferee" and I ask you whether this is a copy, a photostatic copy of the statement of transferee that you signed on July 18, 1968?

A Yes, it is.

MR. LOEWINTHAN: I ask Elpac to produce the original.

MR. GEIST: We don't have the original

of this document?

THE COURT: Why not?

MR. GEIST: Presumably, and this is only from California counsel, this type of document, it is our understanding is filed in the California securities Commissioner as part of the request of the consent and it very well may be, though I can't swear to it, that the statement of transferee is most probably an original document filed in California in the Securities Commission.

MR. DEVINE: I think defense counsel will not object to the introduction of the copy and I think it has been marked in the deposition in this case and I think we will all agree it is an authentic copy and will not object to its admission.

THE COURT: Show it to them.

MR. DEVINE: The defense has no objection to the receipt of this document.

THE COURT: Mark it recieved.

xxxx (Plaintiff's Exhibit 1, received.)

THE COURT: I will advise counsel that I want a copy of all exhibits.

MR. LIPSITZ: We may have a copy here.

Q Mr. Gordon, I show you plaintiff's Exhibit 1 and I ask you whether or not on the last page that is your signature?

Or a copy of your signature?

A It is.

Q I ask you to look at the document, Plaintiff's Exhibit 1, and tell us whether or not the handwriting on the face of each page where things are inserted is in your handwriting?

A No, it is not.

Q When the document, Exhibit 1 was given to you, who gave it to you?

A Mr. Lord.

Q Where did he obtain the document from? Was it in his desk, on top of his desk?

A He took it out of his desk.

Q When he took it out of his desk and gave it to you for signature, do you recall whether or not it was filled in or was it blank?

A It may have been blank.

Q Do you recall whether Mr. Lord filled out the Plaintiff's Exhibit 1 in your presence?

A No, he didn't.

Q Is it your testimony that you signed that document in blank?

A It may have been in blank.

Q I show you an undated --

THE COURT: Of course the other side of that

is, it may not have been in blank.

THE WITNESS: Yes, sir.

Q I show you an undated letter from you to Robert L. Burr, copy of an undated letter from you to Robert L. Burr --

THE COURT: Please mark these before you refer to them.

MR. LOEWINTHAN: Will the defendants concede this is a copy of a letter that Mr. Gordon sent to Burr, or do you have the original?

MR. DEVINE: I believe that the original of this document --

THE COURT: It would be so much easier if we marked these for identification firs. Mark them for identification, then you can refer to them by Exhibit number.

MR. DEVINE: The original of this document was marked at the deposition and we are happy to produce it at this time.

MR. LOEWINTHAN: Let's have it.

I offer this in evidence.

THE COURT: Have it marked for identification, first.

xx (Plaintiff's Exhibit 2, marked for identification.)

THE COURT: Is there any objection?

MR. DEVINE: No objection.

THE COURT: It is received.

(Plaintiff's Exhibit 2, received.)

XXXX Q I show you Plaintiff's Exhibit 2 --

THE COURT: Supposing you let me read it.

(Pause.)

MR. LOEWINTHAN: I have here an undated letter, copy of an undated letter and I would like to mark this as Plaintiff's Exhibit 3 for identification.

XXX (Plaintiff's Exhibit 3, marked for identification.)

MR. DEVINE: Your Honor, we do not concede the admissability of this document at this time.

MR. LOEWINTHAN: Would you like to see it?

THE COURT: You have laid no foundation for it, so far.

Q Would you look at Plaintiff's Exhibit 3 for identification and look at the top line --

MR. LOEWINTHAN: Before that, your Honor, I would like to call upon the defendants to produce the original if they have it, of Plaintiff's Exhibit 3, for identification.

MR. DEVINE: To my knowledge, your Honor, none of the defendants has the original of that document.

Q I call your attention, Mr. Gordon, to the second

line of Plaintiff's Exhibit 3 for identification.

Is the sum of 4500 shares inserted in Plaintiff's Exhibit 3 for identification?

A No, it isn't.

Q I ask you to turn to the last page. Is that a copy of your signature?

A Yes, it is.

Q I ask you to look at Plaintiff's Exhibit 2 and I ask you whether that signature is identical in every respect with the signature on Plaintiff's Exhibit 3?

MR. COOPER: I object ot that. This refers to an instrument not in evidence.

MR. LOEWINTHAN: I am laying a foundation.

THE COURT: I don't think it is necessary or that that is an appropriate foundation.

I don't understand, for instance, the time Exhibit 2 was executed or whatever. Exhibit 2 seems to have just floated in through the window. I don't know anything about the circumstances under which it came into being and I think, obviously, from what I hear, I must know about that before I can rule on Exhibit 3.

Q When did you sign Plaintiff's Exhibit 2, which is the undated letter?

A I signed it on July 18, 1968.

THE COURT: That was at that same meeting with Mr. Burr -- not Mr. Burr, at Mr. Lord's office with Mr. James?

THE WITNESS: Yes.

Q Where did Mr. Lord get that document from, was it in his desk, on top of his desk?

A He took it out of his desk.

Q Did you execute that at the same time that you executed Plaintiff's Exhibit 2 -- Plaintiff's Exhibit 1?

A I did.

THE COURT: What did you do with it after you signed it, Exhibit 2?

THE WITNESS I asked him for copies of what I had signed. He gave me copies that day and I left.

THE COURT: He gave you Exhibit 1, right?

THE WITNESS: Yes.

THE COURT: And you signed that and it was notarized?

THE WITNESS: Yes, sir.

THE COURT: He gave you Exhibit 2?

THE WITNESS: Yes.

e THE COURT: You signed that?

THE WITNESS: Yes.

THE COURT: Did you give it back to him or did

you keep it?

THE WITNESS: I gave it back to him

Q After you turned over the originals to him, what did he do and what did you do?

A I asked him for a copy of what I had signed and he made copies of the documents and gave them to me.

Q I show you Plaintiff's Exhibit 3 for identification and ask you to look at line 2 on Plaintiff's Exhibit 3 for identification and on Plaintiff's Exhibit 2 and tell the Court whether or not they are identical?

A They are not.

Q Where do they differ?

A Exhibit number 3 does not have the amount of shares of 4500 printed in it and Exhibit number 2 has 4500 shares on it.

THE COURT: My problem is, how does Exhibit 3 come into the case, what is its relationship?

MR. LOEWINTHAN: That is what I am about to ask him.

THE COURT: Was it filed somewhere or what happened? What is the foundation for admitting it?

Q Do you know why Plaintiff's Exhibit 2 is different from Plaintiff's Exhibit 3 for identification?

A Because this was obviously filled in after I had signed --

MR. DEVINE: Objection.

THE COURT: Strike that.

May I see Exhibit 3. This is a non-jury case. Let me see it.

Mr. Gordon, referring to Exhibit 3 for identification, I show the second page to you and ask you is that your signature?

THE WITNESS: Yes, it is.

THE COURT: Do you remember whether you signed the original of that document?

THE WITNESS: Yes, I did.

THE COURT: At the time that you signed the original of that document, was the front page in the condition it was now?

THE WITNESS: Yes, it was.

THE COURT: Do I understand that you signed that in addition to Exhibit 2?

THE WITNESS: No.

THE COURT: It is recieved.

(Plaintiff's Exhibit 3, received.)

Q After you executed the documents, Plaintiff's Exhibits 1 and 2, was there any conversation between you and Mr. Lord?

A I asked him --

THE COURT: I am sorry but the record must be

clear with respect to these things and it is just not getting clear.

I take it that the substance of your testimony is that you signed Exhibit 3 in its then condition, anmely, without the number of shares written in, is that correct?

THE WITNESS: That is correct.

THE COURT: And I take it it is your contention or your statement that you never signed Exhibit 2 as it now appears with the shares which are written in; is that correct?

THE WITNESS: That is correct.

THE COURT: That at the time you delivered Exhibit 3, you did not deliver Exhibit 2, you delivered Exhibit 3 which was signed and at that time it was as Exhibit 3 is now, without the number of shares?

THE WITNESS: That is correct, sir.

THE COURT: At the time that you delivered Exhibit 3, did you likewise sign Exhibit 2 with the shares written in?

THE WITNES:: No, sir.

THE COURT: All right, go ahead.

THE WITNESS: May I say one other thing?

THE COURT: No. Just respond to questions.

BY MR. LOEWINTHAN: (Continuing)

Q After you signed these documents, what did you do

with them?

A I asked him for a copy.

Q Did he give you copies?

A He did.

Q Then after you had the copies, was there an continued conversation between yourself and Mr. Lord?

A Yes, there was.

Q Will you tell the Court what he said to you and what you said to him?

A I asked him when the papers were coming from California, with reference to the California Commission, the bank, Mr. Burr's guarantee of the stock being registered, the corporation's acceptance of the transaction and he said don't worry about it, it will be forthcoming, they are working on it.

I also asked him about how the company is doing and he said it is doing great, the orders are coming in and the company is making a profit. (218)

Q Was there any conversation in connection with the other members of the group who were at the meeting in June of 1968?

THE COURT: Read that question to me.

(The question was read.)

THE COURT: On this occasion, July 18?

MR. LEWINTHAN: On July 18.

THE COURT: Go ahead.

Q Do you remember the question?

A He told me this is routine what we are doing and everybody has executed these papers. They have to be sent to California in order to expedite the sale of these shares and everybody has already done it, I am the last one.

Q Was there any discussion as to the financial condition of the company at this meeting in July of 1968?

A Just that the company needed mony and that the company is making a profit in July and would be showing a very, very nice financial.

Q When next did you talk with Mr. Lord?

A Sometime later, possibly in the month of August.

Q Did this conversation take place by telephone or was it a face to face confrontation?

A The first time I spoke to him was on the telephone.

Q What did he say to you, what did you say to him?

A He called me to -- I asked him how everything was going, why it was taking so much time and he said this is what red tape takes in California, getting the consent, getting the corporation to consent, the bank and making arrangements with reference to Burr's guarantee of getting the stock registered. He said these things take time.

Q After July 18 and during the month of July or August, did you speak with Mr. Burr?

A Yes. Mr. Burr called.me.

Q Called you on the telephone?

A Yes, he did.

Q Approximately when would you say that call was made?

A Early August of 1968.

Q What did you say to him, what did he say to you?

A He said everything was going along fine, that they were expediting all the figures and again we spoke about I would like to see some figureso on the corporation and he said he would see to it and see they are mailed to me.

Q When next did you hear from Mr. Lord or Mr. Burr?

A I got a telegram from Mr. Burr from California on August 21, 1968.

Q I show you a western union telegram dated August 20, 1968 and ask you whether or not this is the telegram that you received?

A Yes, it is.

MR. LOEWINTHAN: Can we mark this Plaintiff's Exhibit 4 for identification.

(Plaintiff's Exhibit 4, marked for identification.)

Q Is this the envelope in which it came?

A Yes.

MR. LOEWINTHAN: Can we include that as part of the exhibit?

THE COURT: Yes.

MR. DEVINE: Your Honor, I would like to point out to the Court that in the depositions concluded on Monday of this week, we requested the production of the original of this telegram and the plaintiff informed us that he was unable to find it and it is now produced.

THE COURT: I think that is a matter appropriate for cross examination, if you would like.

Any objection?

MR.DEVINE: We do not concede its admissability at this time.

THE COURT: I will look at it.

On what grounds, sir?

MR. DEVINE: Particularly on the grounds there is handwriting on this document for which there has been no foundation laid.

THE COURT: I will admit the telegram and exclude the handwriting.

MR. DEVINE: Thank you.

MR. LOEWINTHAN: If counsel is pleading surprise at this --

THE COURT: Counsel isn't pleading surprise. He is merely objecting to the handwritten portion of the telegram and I am saying I am receiving only the typed portion of the telegram.

MR. LOEWINTHAN: I want to point out to the Court at the EBT's we did not have the original, it couldn't be found but we gave them an actual copy made sometime before so they did have this telegram at all times during the deposition.

(Plaintiff's Exhibit 4, received.)

MR. LOEWINTHAN: May I proceed, your Honor?

THE COURT: Yes.

Q When you received this telegram, Plaintiff's 4, what did you do?

First, when did you receive it?

A I received it on August 21, 1968.

Q Do you recall at what time of the day it was received?

A It was sometime around two o'clock or 2:30. It was sort of getting late in the afternoon.

Q What did you do when you read the telegram?

A I called Mr. Burr in California.

Q Did you speak to him?

A Yes, I did.

Q Was Mr. Lord in California at that time?

A Yes, he was.

Q When you spoke to Mr. Burr, was Mr. Lord on another extension?

A He came on, yes.

Q What did you say to Mr. Burr and with Mr. Lord and what did they say to you?

A I told him it was impossible for me to get the money out in California as per the instructions of the telegram.

Q Will you talk up a little.

A I said it was impossible for me to get the money out in California as per the telegram. The instruction stating by 1 p.m. California time on the 21st of August, 1968, because it was too late and I would have to make arrangements and go downtown to my bank and Mr. Burr said don't worry about that, just get it out tomorrow and it will be okay.

I said what about the instructions on the telegram and he said we will be in New York tomorrow,"Arnold and I will be in New York tomorrow and we will take care of that."

Q What did you do after that conversation?

A I called my bank and made arrangements for the $45,000 to be wired out as per the instructions in the telegram.

Q Did you bank wire the funds?

A They did.

Q What date was that?

A They wired them, I believe, on the 22nd, August 22, 1968.

Q Did Mr. Burr and Mr. Lord come to your office on August 22, 1968?

A They did.

Q Approximately what time did they get there?

A Late in the afternoon, sometime.

Q Will you tell the Court what you said to them and what they said to you?

A I asked them to please make the corrections on the telegram, initial it and sign it and that is what they did.

Q Did they initial the first line of the telegram?

A Mr. Burr started to write and he started to make the change -- rather, the initialing, and I asked Mr. Burr to please have Mr. Lord make the changes or initial it himself and he should sign for himself, so he put Arnold's, or Mr. Lords initials on the top line but after that Mr. Lord did it himself.

Q Is it your testimony that Mr. Lord's initials appear on the forth line with Mr. Burr's initials?

A They are.

Q Were those initials placed on the telegram in your

presence?

A They are.

THE COURT: The writing referred to is received in evidence.

Q I show you Plaintiff's Exhibit 4 and ask you whether or not the writing on the bottom of the Exhibit was written by one of either Lord or Burr?

A It was.

Q Whose writing is that?

A Mr. Lord's.

Q Who signed the so-called amendment?

A Mr. Lord and Mr. Burr.

Q Did they sign it in your presence?

A Yes, they did.

THE COURT: That writing is received as well.

Q Was there any discussion at that time between Mr. Lord, Mr. Burr and yourself in connection with the Elpac deal?

A Yes.

Q What did you say to them and what did they say to you?

A I asked Mr. Lord and Mr. Burr when the papers would be forthcoming with reference to the California Commission, the corporation's acceptance of the sale, the bank's acceptance of the sale and release of the stock and his guarantee of the stock being allowed for trading.

In other words -- forgetting the word I used -- Registered. His guarantee that the stock would be registered by April 30, 1969.

He said not to worry, they are all going to come.

THE COURT: Who said that?

THE WITNESS: Mr. Burr.

A (Continuing) The attorneys are taking care of everything, it is just routine.

I asked him how the company was doing again and he assured me they are doing very, very well and that the company made a profit for the month of July and that they are going to make a profit for the rest of the year and the way things are going, surely for 1969, also.

I asked him for the monthly financials so I could see for myself and evaluate how the company is progressing and he said he would definately see that the controller's office would send me penciled copies.

Q Was there any conversation in connection with the other members of the group who had attended the meeting of June, 1968 at that time?

A There was.

Q What did htey say to you, what did you say to them?

A I asked him if everybody had sent their money in and

Q Who said?

A Mr. Burr and Mr. Lord both assured me that everybody had already sent their money in and in exactly the same way.

Q After August 22, 1968, when did you next talk with Mr. Lord or Mr. Burr?

A I spoke with Mr. Lord. I called him at his office sometime in September or October and asked him what is happening to the stock because I didn't receive it yet and I still didn't get any letters from Mr. Burr or from the California Commission or from the bank or from Elpac for permission of the sale of the stock and again he assured me it is just red tape and that Mr. Burr was working on it.

Q Did you speak to Mr. Burr after August 22, 1968?

A Yes, I did.

Q Did you talk to him by telephone?

A Yes, I did.

Q Approximately when?

A Sometime around September or October.

Q What did he say to you, what did you say to him?

A I asked him why I didn't receive my stock certificates. I also asked him why I didn't receive any of the other letters he had promised me and again he assured me it is only red tape out in California and that it is normal.

I asked him again for the monthly financials

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which he said he will see to it that they are going to be mailed out.

Q Did you receive them?

A No, I didn't.

Q When did you next speak to Mr. Lord?

A I called sometime in either November or December and I want to know where my stock was and Mr. Lord told me that the stock was down -- it was in Phillips, Appel's office and I asked him if I could come down and get them and he said certainly, to come down any time I want.

Q Did you go down to the office of Phillips, Appel & Walden?

A I did.

Q Approximately, when?

A Either December, the beginning of December, sometime in December or maybe January.

Q What took place when you went down to the office at that time?

A I went there and I asked the young lady at Phillips, Appel & Walden if I could receive my stock. Ishowed here identification. I told her I was informed by Mr. Arnold Lord that my stock certificates of Elpac Corporation were now in the possession of Phillips, Appel a Walden and I came down to pick them up.

MR. LIPSITZ: Could we know what office he went to?

THE COURT: Yes.

THE WITNESS: I think on 37th Street and Seventh Avenue.

Q What happened?

A She said she knew nothing about them. She got on the phone and called somebody and they said that they either didn't know where they were or they weren't there.

Q Did you see Mr. Lord on that occasion?

A I went downstairs and tried to see Mr. Lord, but he wasn't in and I spoke to Mr. James who was there and I told him about the situation and he said he would tell Mr. Lord.

Q Did Mr. Lord and Mr. James occupy the same office at Phillips, Appel & Walden?

A They did.

Q When did you next talk with Mr. Lord?

A I called him back -- I called and left a message and finally he called me back. I told him about it, that I went down to the office and couldn't get my stock and he said ther must be some sort of a mistake or mixup.

THE COURT: How long after the time you went to the office was that?

THE WITNESS: I would say we were sometime

in January right now.

Q When you didn't receive the stock in December and January, what did you do, did you speak to Mr. Lord or Mr. Burr again?

A I tried to get ahold of them.

Q What happened?

A I never was able to speak to them. They never returned my calls. Mr. Burr in California, they would also take a message or I would call person to person or reverse the charges and I could never get through to them -- him.

Mr. Lord, if he was in, he wouldn't return my calls or I couldn't see him.

Q When you couldn't get through to them by telephone, what did you do?

A I went to the attorney general's office.

Q Approximately when was that?

A Sometime in about February of 1969.

Q I didn't hear you.

A Sometime in February of 1969.

Q What did you say to the Attorney General and what did he say to you?

A I told him what had happened, that I purchased the stock of Elpac, that I never received the certificates, and that I was having a lot of trouble getting ahold of the people

that represented this deal to me and I haven't been successful. He said he would try to help me.

Q I show you an original of a letter dated March 6, 1969 and I ask you whether or not you received this letter from the Department of Law of the Attorney General's office?

A Yes, it is.

MR. LOEWINTHAN: I ask it be marked for identification.

XX (Plaintiff's Exhibit 5, marked for identification.)

THE COURT: We will take the morning recess now.

After counsel have read that, send it into the robing room.

(Recess.)

THE COURT: Are there any objections to Exhibit 5?

MR. DEVINE: No objection, your Honor.

MR. COOPER: Except that it should be admitted with the attached copy of the letter.

THE COURT: Exhibit 5 as I have it consists of a letter from the Department of Law to Mr. Gordon and an attachment of a letter from a lawyer named Massing.

THE COURT: It is received.

XXXX

(Plaintiff's Exhibit 5, received.)

Q After you received Plaintiff's Exhibit 5, the letter from the Attorney General, what did you do?

A It was about the early part of March, I believe, 1969. I believe I called Mr. Lord and told him that the stock -- they didn't have my address so how could the stock be at Phillips, Appel & Walden and he said to me they didn't know what they are talking about, the stock is down here and there must be some confusion.

Q What did you do?

A I went down to Phillips, Appel & Walden.

Q What time was that?

A Sometime in March of 1969.

Q What happened when you went down there?

A I went down to the lower offices and in the hallway I met Stuart Steinberg.

Q Who was Stuart Steinberg?

A Stuart Steinberg is the Steinberg Junior that I testified to before, one of the individuals that was going to participate in the purchase of the Elpac stock.

Q What did you say to him and what did he say to you?

A We said hello and we started to talk about the Elpac situation and he said to me "What do you mean Elpac situation, I never went into the deal."

"Arny told me that everybody bought the stock."

Q When you say "Arny" do you mean Arnold Lord?

A Yes, and from there we went from the hallway into his office and he told me that they turned the deal down. He told Mr. Lord he wasn't interested in the deal and he never purchased anything, any shares of Elpac Corporation.

THE COURT: Let me understand.

This last bit of conversation you have just told me about, namely Steinberg Junior saying "I never purchased any shares of Elpac," did that take place in Lord's office in his presence or not?

THE WITNESS: No.

THE COURT: Go ahead.

Q Where did that conversation take place exactly?

A It took place in the offices of Phillips, Appel & Walden in the lower level but in the hallway that separates the individual offices.

Q After you had the discussion, what did you do?

A After I finished talking to Mr. Steinberg, I went into Mr. Lord's office.

Q Which was where in relation to Mr. Steinberg's office?

A On the other side of the hallway.

Q Was Mr. Lord present?

A No, he wasn't.

Q Was anyone there?

A Mr. James was there.

Q What did you say to Mr. James and what did he say to you?

A I asked him to please have Arnie call me immediately as soon as he hears from him because I have some very bad news and I am very, very upset and I want to get it straightened out with him.

Q Did Mr. Lord call you?

A I believe I called him back.

Q Did you speak to him?

A Yes, I did.

THE COURT: The same day or later?

THE WITNESS: Not the same day, at a later date.

Q Approximately how long after?

A A week.

Q What did you say to him and what did he say to you?

A I told him that I had met Stuart Steinberg in the hallway in Phillips, Appel & Walden and he told me he never went into the deal and how could you have told me that

everybody went into that deal in the exact same fashion that I went in and he said stop getting excited, you got your stock, didn't you and I said I didn't get my stock. I said as a matter of fact, I went down to Phillips, Appel & Walden as you instructed me to and the stock wasn't there again and I happened to meet Stuart Steinberg by accident to find thisthis information out.

He didn't have time to talk to me, I will have to see you and explain the whole thing in person and he was very busy and that was it.

Q Did you ever receive your stock from Elpac?

A Yes, I did.

Q When approximately did you receive it?

A Either atthe end of March of 1969 or the beginning of April, 1969.

Q I show you stock certificate number LD 842 of Elpac and ask you if this certificate is the one you received?

A It is.

Q I show you the transmittal receipt and ask you whether or not you received this with the certificate?

A It is.

Q I show you an envelope and ask you whether or not this is the envelope in which the certificate and transmittal receipt came?

A It is.

MR. LOEWINTHAN: I offer it for identification as Plaintiff's Exhibit 6, as one exhibit.

XXXX (Plaintiff's Exhibit 6, marked for identification.)

MR. DEVINE: We have no objection to the admission of this series of documents.

THE COURT: They are received.

XXX (Plaintiff's Exhibit 6, received.)

THE COURT: Let me see them, please.

Can anybody make out the postmark on the envelope?

MR. COOPER: I believe it is March 28, 1969.

MR. LOEWINTHAN: I have a copy of the envelope and the transmittal receipt.

THE COURT: All right.

Q After you received the certificate, Plaintiff's Exhibit 6, what did you do next?

A I tried to get ahold of Mr. Burr and Mr. Lord.

Q When you say you tried to get ahold of them, did you call them by telephone?

A Called them by phone.

Q What happened?

A I wasn't able to get to them. I left messages

but never got calls.

Q How many times did you call them?

A Many, many times.

Q This is after March 28, 1969?

A Right.

Q Did you call Mr. Mann?

A Yes, I did.

Q Was Mr. Mann very friendly with Mr. Lord?

A Yes.

Q What did you say to Mr. Mann and what did he say to you?

THE COURT: When did you call him?

THE WITNESS: I called him after I found out the information from Mr. Stuart Steinberg.

THE COURT: You got the stock on or about March 28, 1969, March 29, somewhere around April 1st?

THE WITNESS: Right.

THE COURT: How much after that was it that you called Mann?

THE WITNESS: I called Mann before that.

THE COURT: I want to know if you called Mann before you received the certificate?

THE WITNESS: I called Mann after I tried to get ahold of Mr. Lord and he wouldn't call me back and I knew

Stuart Steinberg told me he didn't go into the deal --

THE COURT: You called Mann after you spoke to Mr. Steinberg but before you received the certificate?

THE WITNESS: Right.

Q What did you say to Mr. Mann?

A I told him it appeared I was taken because nobody went into the deal and Arnie Lord had told me and Mr. Burr had told me and nobody else paid any money.

I asked him if he could please help me out to get ahold of Mr. Lord.

Q What did Mr. Mann say?

A He said he will do whatever he possibly can to help me.

Q When did you next speak to Mr. Mann or Mr. Burr or Mr. Lord?

A Sometime about July of 1969, I believe.

Q Who did you speak to?

A Maybe it was the end of June or the end of July.

Q Whodid you speak to?

A I spoke to Mr. Lord.

Q Is this the first time you had talked to him since March 28 when you had received the stock?

A Yes.

MR. DEVINE: We object to the question to the

extent it includes the assumption that he spoke to Mr. Lord on the 28th.

THE COURT: I didn't understand it. He is asking him did he speak to Mr. Lord between the 28th and this time.

Overruled.

Q What did you say to him, what did he say to you?

A I told him, Arnie, you have to get me my money back because this whole deal is very unfair. I didn't go into the deal on just selling me the stock. You sold the stock in a package. He said, "Irving, I can't talk to you too much. I got involved in a lot of different things. I will do what I possibly can to help you," and the only reason I was even able to talk to him was because he said how I had spoken to him, he knows what the situation is and he will do everything he can for me.

Q Did you speak to Mr. Burr on the telephone between March 29 and -- after March 28?

A I couldn't get ahold of him.

Q What did you next do?

A I waited awhile after speaking to Mr. Mann. Mr. Mann said that Arnie Lord is making some efforts to get me back my money and to just be patient for a while. I said Howie, if he does it, fin. My patience is running out.

I then went up to Mr. Jacob's office, the attorney at the original meeting --

THE COURT: Just hold up for a minute.

You went to Jacobson's office. When was that?

THE WITNESS: Sometime I believe the latter part of 1969.

Q What did you say to Mr. Jacobson and what did he say to you?

A I told Mr. Jacobson what had happened and I found out that I was the only one that paid my money and that Stuart Steinberg and Adlman and all the others never participated in the deal and I told him that I needed some help because nothing is being done for me, and Mr. Jacobson brought in his partner and they spoke about the case and in the last minute he said to me, "You know, it appears we won't be able to handle it," and I asked him why and he said that they handle other stock brokerage accounts and they don't think it would be in the best interest of the firm to handle the case.

I asked him do I have a case or don't I and they said I have a case but they can't handle it and I shook his hand and left.

Q What did you do during the year of 1970, about the

Elpac situation?

A I tried to get Howie Mann really to assist me in any way I possibly could to get my money back without possibly going through Court or through attorneys, but of course it never came to pass.

MR. LOEWINTHAN: No further questions, your Honor.

THE COURT: Mr. Devine?

Please for the record identify yourself by name and by client.

MR. DEVINE: Mike Devine, representing the defendant Arnold Lord.

May I ask at this time, your Honor, if the Plaintiff intends to call any witnesses other than himself?

THE COURT: I will not require him to answer that. Just proceed with your examination.

MR. LOEWINTHAN: Your Honor, if I may ask this; we have some witnesses standing by. Can I inquire if it is possible for counsel to tell us approximately how long he anticipates cross examination will be so I can have my witnesses here? One of the witnesses,a Mr. -- he is an attorney.

THE COURT: How about that, Mr. Devine? How many other counsel will cross - examine this witness?

MR. LIPSITZ: We intend to cross-examine. I am Steven Lipsitz representing Phillips, Appel & Walden.

MR. COOPER: I am Milton Cooper representing Burr and I intend to cross-examine.

THE COURT: About how long do you anticipate you will be?

MR. DEVINE: I think it could be an hour.

THE COURT: Tell your witnesses to come back at two o'clock.

MR. LOEWINTHAN: They are not here, your Honor, I have to call them.

THE COURT: Listen, there is one think I think you better understand. This case will proceed without delay. Tell your witnesses to be here at two o'clock.

MR. LOEWINTHAN: Can I have a five-minute recess?

THE COURT: You can call them at a quarter of one and tell them to be here at two o'clock. I don't propose to sit around waiting for these people to arrive here.

MR. LOEWINTHAN: I will do that.

MR. DEVINE: Would it be all right if I use this podium?

THE COURT: Of course.

Do you intend to prove something in the way of damages or do you feel you have done that?

MR. LOEWINTHAN: We will do that, your Honor.

THE COURT: All right.

MR. LOEWINTHAN: Also, we are asking --

THE COURT: You are asking for a rescission. I understand that too.

CROSS EXAMINATION
BY MR. DEVINE:

Q Mr. Gordon, I have put in front of you Plaintiff's Exhibit 1 in evidence.

I would like to ask if that is a document which came out of your files?

A I can't answer if this came out of my files, but there is a document of this nature.

Q When you signed the original of that document, did you receive a copy?

A Yes, I did.

Q Who gave you the copy that you received?

A Mr. Lord.

Q After you had signed this and it had been notarized, did Mr. Lord leave the room and have it copied?

A Yes, he did, I believe.

Q And he came back and presented you with this copy?

A If it is this copy, yes.

Q Do you have any other copies of that document?

A I am not sure. I would have to ask my counsel.

MR. LOEWINTHAN: Yes, we have copies that we gave to counsel for the defendants and I think I amy have copies here, and we gave the Court a copy.

Q Do you have the copy Mr. Lord gave you on the day on which you signed this?

A My attorney may have it.

MR. DEVINE: May I call for its production.

MR. LOEWINTHAN: There are so many copies, I don't know which is the one that Mr. Lord gave me, but we have copies of the documents.

MR. DEVINE: Would you give me all of the copies of the document that you have.

MR. LOEWINTHAN: The defendants' counsel were given copies at the EBT and we gave the Court a copy.

MR. DEVINE: Counsel for the plaintiff has given me two copies of the Plaintiff's Exhibit 1, two additional copies and I would ask that they be marked as Defendant's Exhibit A for identification, as one exhibit.

(Defendant Lord's Exhibit A, marked for identification.)

Q Mr. Gordon, I am now showing you Plaintiff's Exhibit A for identification which is two additional copies of what

has been marked Plaintiff's Exhibit 1, in evidence.

I would ask you to look at Defendant's Exhibit A and tell us whether Plaintiff's Exhibit 1 -- whether you have any other copies of this document, whether you have ever seen any other copies of this document?

A I may have seen a copy of it, another copy maybe at the EBT.

Q Isn't it true that one of these three copies of this document is the copy that Mr. Lord gave you on July 18?

A I don't know.

THE COURT: Do they differ in any way?

MR. DEVINE: Your Honor, what I am hoping to show here, is that all of the copies that have ever been produced of this document in this case and all of the copies that this witness has ever seen are filled in and the only way he could have received a filled in copy is if the copy that Mr. Lord left the room and copied was already filled in.

THE COURT: You are talking about Exhibit 1. I think the question rises with respect to Exhibits 2 and 3.

MR. DEVINE: I believe the testimony was that he may have signed Plaintiff's Exhibit 1 in blank.

THE COURT: He said it may have been blank and I said it may not have been blank and he agreed with that.

MR. DEVINE: I wish to show by having all of

the copies of this in the Plaintiff's possession produced that all of the copies he has are filled in.

Q Do you have any copies of this document which are not filled in, Mr. Gordon?

A We may have a copy, if my counsel has a copy.

MR. LOEWINTHAN: I don't have any other copies.

THE COURT: In any event it is clear, is it not, by the time Mr. Lord gave you a copy of Exhibit 1, it was filled in?

THE WITNESS: Yes.

MR. DEVINE: Thank you.

MR. LOEWINTHAN: Would you Honor give me one moment to look at my file?

THE COURT: Yes.

(Pause.)

THE COURT: Gentlemen, to direct your attention to what interests me as I heard the direct testimony, this man claims he was the subject of a fraud which had at least as one of its aspects a representation that all the people who were at the meeting and who said they were going to participate in the purchase of, I believe, the 20,000 shares of stock did in fact purchase and in reliance on that, he paid or caused to be paid by wire the amount of money of

45,000 for the stock in question.

That basically, it seems to me is one of the key aspects of this case. That is one aspect.

The conduct, of course, is, as the witness tells it of whether or not another aspect of it was misrepresentations by Mr. Lord or Mr. Burr with respect to 1, the financial situation of the company; 2, the delivery of the stock; 3, the financial prognosis, may perhaps be another aspect of the fraud that is alleged here.

That is really what I am interested in and if there is anything more than that, please go ahead, but I thought it may just sharpen matters if I tell you what I understand to be the core of the charge.

MR. DEVINE: I think we will come to that, your Honor, if you will bear with me.

THE COURT: Go ahead.

BY MR. DEVINE: (Continuing)

Q Would you look at Plaintiff's Exhibit 1 which is in evidence before you.

Would you read the first two paragraph of that statement for the court?

A "The undersigned intends to purchase 4,500 shares of common stock of Elpac, Inc. from Robert L. Burr at a price of $12 and makes the following statements: I have

received from the issuer and or the transferror a recent financial statement of the issuer and such additional information with respect ot the issuer as I have deemd necessary to make an independent evaluation of the business prospects of the issuer and the fairness of the investment."

Q What box is checked of the "Yes" or "No" boxes?

A The "Yes" box.

THE COURT: Who checked it?

THE WITNESS: This was all -- I never filled anything out on any of these sheets outside of signing them.

Q Did you read this document before you signed it?

A I may have read it.

Q Mr. Gordon, I have put in front of you Plaintiff's Exhibit 3 in evidence in this case.

With the exception of the $4500 which appears on the first line, is it your testimony that there is any difference between that Exhibit and Plaintiff's Exhibit 2?

THE COURT: I believe you said $4500. Did you mean 4500 shares?

MR. DEVINE: Yes.

A I believe it is the same outside of that one deletion.

Q Isn't it true on July 18 you intended to purchase 4500 shares?

A July 18?

Q Yes.

A Of 1968?

Q Yes.

A Yes, I did intend to purchase 4500 shares.

Q Would you look at the last paragraph on page 1 which is concluded on the top of page 2 which states that you are purchasing these shares for your sole investment and not with a view toward resale, and that the certificate which will represent these shares will be so legended; is that correct?

A As I testified in the EBT, Mr. Lord knew that--

Q I just asked you if that was correct?

A You would have to repeat the question, sir.

(The question was read.)

Q Is that what that paragraph says in substance?

A I don't believe that paragraph says that.

Q Would you like to read that paragraph?

A At one time or another I am going to sell those shares and that is why one of the conditions of the purchase was to have the shares registered.

Q Read that paragraph.

THE COURT: Don't read it out loud.

Do you know the difference between investment

stock and free trading stock?

THE WITNESS: Yes.

THE COURT: When you undertook to buy the 4500 shares of this stock, did you understand you were buying letter stock or investment stock?

THE WITNESS: Yes, I did.

Q Does the stock certificate which is Plaintiff's Exhibit 6 in evidence contain the legend restricting transfer, which the investment letter refers to?

A Yes.

Q Isn't it true that you violated that restriction?

A No.

Q And you violated the investment letter?

A No, I didn't.

Q Didn't you resell these shares?

A I never sold -- resold these shares.

Q Did you purchase these shares?

A I did.

Q Did you purchase 4500 shares?

A I technically purchases 4500 shares, yes.

Q Didn't you resell them?

A I never resold them.

Q Do you still own them?

A I still have the stock certificate.

Q Do you own the 4500 shares?

A I own 3,000 of the 4500 shares.

Q Didn't you resell the other 1500?

A No, I never did.

Q How did you dispose of it?

A I never disposed of it.

Q Mr. Gordon, if you had 4500 and you now have 3000, I think it follows that you disposed of 1500?

A I think your wording is very poor. We went over this in the EBT.

Q What did you do?

A I got permission from Mr. Lord to purchase the 4500 shares of which 3000 shares would be in my behalf and 1500 shares would be other peoples money and when the purchase was made, it was made with $15,000 at one time. Idid not resell the shares. They came in with me.

Q I remember you telling us now that you didn't purchase 4500 shares, you only purchased 3000.

A I purchased 4500 shares of Elpac stock.

Q Now did you dispose of 1500?

A I never disposed of 1500.

Q Do you still own 4500?

A I am the posessor of a certificate of 4500 shares in Elpac stock.

Q You don't own 4500 shares?

A Other people have an interest in that 4500 shares.

Q Does Mr. Irving Levitt own 500 shares of Elpac?

A That is correct.

Q Are those 500 shares part of the 4500 which you allege you purchased?

A He has an interest in the 4500 shares. It cost him $5,000, the exact cost of 500 shares at the time I purchased the 4500.

Q Did he purchase that interest?

A I purchased it along with him the 4500 shares but I put it all in my name.

Q Does Ira Jacobs have an interest in 150 shares of your 4500 shares?

A That is correct.

Q Does Henry Tepper have an interest in 500 shares?

A That is correct.

Q Does Mrs. Esther Jacobs have an interest in 550 shares?

A That is correct.

Q Isn't it true that they jointly own 1500 shares?

A They have an interest of 1500 shares.

Q As owners, is that correct?

MR. LOWENTHAL: If your Honor please, I object to this line of questioning.

THE COURT: Sustained. Let us get at the facts.

I understand you bought 4500 shares, is that correct?

THE WITNESS: Yes.

THE COURT: You caused the funds to be withdrawn from you bank account, $45,000 to be wired to California, is that correct?

THE WITNESS: Yes.

THE COURT: I understand the substance of you testimony here to be that these various people -- I beg your pardon -- that 3000 of those 4500, that you in effect paid $30,000 for the purchase of these shares?

THE WITNESS: Yes, that is correct.

THE COURT: And the remaining people paid $15,000 toward the payment of the balance of $45,000?

THE WITNESS: Correct.

THE COURT: The shares were taken in your name?

THE WITNESS: Yes.

THE COURT: With the consent of the people who paid the $15,000, is that correct?

THE WITNESS: That is correct.

THE COURT: And that is where matters stand at the present time?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q Is it your testimony that you first heard of Elpac Inc. from Howard Mann?

A Yes.

Q Is Howard Mann a client of yours?

A Yes, he is.

Q For how long has he been a client of yours?

A Many years.

Q Was he active in the stock market in 1968/

A I believe so.

Q In 1967 and 1968, were you familiar with Mr. Mann's securities transactions?

A At the end of the year we would recap his transactions, yes.

Q For the purpose of preparing his tax returns, is that correct?

A That is correct.

Q During 1967 and 1968, Mr. Mann was a very successful investor, wasn't he?

MR. LOEWINTHAN: Objection.

THE COURT: Sustained.

Q Do you know if Mr. Mann was a successful investor in 1967 and 1968?

MR. LOEWINTHAN: Objection.

THE COURT: I will permit it. Go ahead.

A What was the question?

THE COURT: Do you know whether in 1967 and 1968 Mr. Mann was a very successful investor in the stock market.

A What do you mean by very successful investor?

Q That he realized profits in those endeavors.

A Are you taling about one hundred dollars, ten thousand dollars, a million dollars?

Q Tell us how much he realized, if you know?

MR. LOEWINTHAN: Objection.

A I don't think I am at liberty to divulge it.

THE COURT: I will permit it.

A I don't know how much profit he made in the year 1967 and 1968.

Q You respected him as a security investor, didn't you?

A When you say respected him, he was a trader, like anyone an he was an investor.

Q You respected his judgment and his performance, didn't you?

A As much as I would respect any other person.

Q In May of 1968, had Mr. Mann purchased securities

of Elpac stock in a private placement?

A I don't know if it was in May of 1968.

Q In the spring of 1968?

A Sometime in 1968.

Q When did you learn of Mr. Mann's purchase?

A Sometime in June of 1968 when I met him in Las Vegas.

Q What did he tell you about that purchase of Elpac stock which he had made?

A He said he purchased 5000 shares of stock at ten dollars a share for $50,000.

Q What more did he tell you?

A He went out to the plant to visit to see how the plant was doing, what type of physical plant it was and it appeared to be a very, very good deal.

Q Did you know at that time that in the private placement Mr. Mann had purchased at a substantial discount from the market price?

A Which time?

Q When he first told you of his purchase?

A He didn't tell me what the market price was on that day.

Q Did you know from him that he had purchased at a discount?

A Not at that time.

Q When did you learn that?

A When we were discussing the amount of dollars I would have to pay.

Q What did he tell you?

A He told me that the price was about 15 or 16 dollars and he paid ten.

Q Did he tell you whether he received investment stock, lettered stock, in the private placement?

A He told me he bought inside stock.

Q Inside stock?

A Right.

Q Did you understand that to mean restricted stock?

A Yes.

Q Did Mr. Mann tell you who any of the other investors were in the private placement in the spring of 1968?

A If it was May of 1968, he told me there were two funds and another large buyer, a big investor, an individual.

Q Did he tell you the names of the funds?

A I don't remember them.

Q Did you consider them to be large and substantial funds?

A One of the funds I knew the name of.

Q Might it have been Value Line?

A Possibly that was the name.

Q Do you know who the large institutional investor, the third investor he mentioned to you was?

A No.

Q Did he tell you it was?

A He mentioned some name but it didn't ring a bell. He told me it was an individual that bought quite a size for one man.

Q Did you consider it significant in June of 1968 that institutional investors had invested in Elpac Stock in the private placement in the spring ?

A Yes.

Q Did you consider that a favorable factor in evaluating Elpac as an investment?

A Yes.

Q Will you tell us again when it was that you first spoke to Arnold Lord with respect to Elpac, excluding the Las Vegas conversation, the first time after that?

A When I got back to New York, a short time after I got back, maybe a week.

Q You had already spoken to Howard Mann about Elpack, hadn't you, at that time?

A I believe so. Howard had called me.

Q Wasn't it at Howard Mann's request that Arnold Lord

called you?

A That is correct.

Q Hadn't you asked Mr. Mann to have Mr. Lord call you?

A I asked Howard if he could talk to Mr. Lord to see if he could ift me into any shares that may be available on the next sale.

Q At that time you were desirous of purchasing Elpac stock?

A Yes, I was.

Q It was for that reason that you asked Mr. Mann to have Mr. Lord call you; is that correct?

A In effect.

Q When Mr. Lord called you, he told you that the private placement in the spring was completely sold, isn't that so?

t A Which one are you referring to, the one that had already been sold that Mr. Mann had purchased?

Q Yes, the private placement in which Mr. Mann had participated. He told you that was fully sold?

A We didn't even talk about that one. That was never brought up.

Q Did he tell you whose shares might be available for purchase at that time? Did Mr. Lord tell you?

A Mr. Lord told me that there was somebody that has either dropped out or going to drop out and there could be

some for me.

Q Did you understand at that time he was referring to the private placement in which Mr. Mann had purchased?

A I didn't understand that. I understood it to be a new placement that he was making. The other one, I assumed, was completed.

Q Isn't it true that at the first time, the first occasion when you spoke to Arnold Lord, you had already decided to purchase Elpack stock; isn't that so?

A No.

Q I would like to direct your attention now to the 20,000 share block which I believe you testimony is, was discussed at a meeting in June at Mr. Steinberg Senior's office.

Do you recall that?

A Yes.

Q At the time of that meeting, who did you understand were to be the purchasers of that block?

A Mr. Steinberg, Jr., Mr. Adlman, myself, two gentlemen from Philadelphia.

Q Do you know the names of the gentlemen from Philadelphia?

A No, I never got those gentlemen's names.

Q At the time of the meeting in June of 1968, did you

know their names?

A They mentioned their names and I believe the attorney wrote their names down.

Q Did you at that time know who they were, what their occupation was?

A I didn't.

Q Did you know what kinds of investors they were or even if they were investors?

A I was told that we were the investors to participate for the total of 20,000 shares and that was the purpose of the meeting.

Q Did you know what the investment experience had been of these two gentlemen from Philadelphia?

A I didn't know these people at all.

Q Did you know Mr. Steinberg, Jr. prior to the June meeting?

A No.

Q Did you know his father prior to the meeting?

A Never met him.

Q Did you know Mr. Adlman prior to the meeting?

A No.

Q Did you know at the time of the meeting or during the meeting, did you learn what that was, what the occupations of those threee gentlemen was, Mr. Steinber, Sr., Mr. Steinberg

Jr. and Mr. Adlman?

A Yes.

Q What occupations did you understand at that meeting they were engaged in?

A Mr. Steinberg, Jr. was a stock broker working for Phillips, Appel & Walden. Mr. Adlman was also a stock broker working for Phillips, Appel & Walden and Mr. Steinberg, it appeard to me was either management or real estate management or some sort of that business.

Q At the time of the meeting in June of 1968, did you know what the investment experience of these three gentlemen had been prior to that time?

A No.

Q At this meeting in June of 1968 and in the weeks that followed, did you consider it important that the 20,000 share block be fully purchased?

A Yes.

THE COURT: At that meeting, did Mr. Steinberg, Sr. say he was going to buy shares?

THE WITNESS: Not that I remember. It was his son.

THE COURT: What did his son say?

THE WITNESS: His son was one of the participants, a buyer of a large block of stock.

THE COURT: His son at that meeting said he was going to buy a substantial number of those shares?

THE WITNESS: Right.

THE COURT: And that son was employed by the defendant stock brokerage firm?

THE WITNESS: Right.

THE COURT: Mr. Adlman, what did he say at that meeting about buying shares?

THE WTINESS: He was going to participate with myself along with the other two gentlemen from Philadelphia.

THE COURT: At that time, did you know him to be a member of Phillips, Appel, working for them?

THE WITNESS: Yes. The two of them said they were member or working for Phillips, Appel & Walden.

THECOURT: Do you know how many shares young Mr. Steinberg said he was going to buy or Mr. Adlman for that matter?

THE WITNESS: Mr. Steinberg was going to take a big share, pretty close to double of mine and it may have been that his father was going to participate with him, but he didn't say.

THE COURT: Your best recollection as you sit here now is that the younger Mr. Steinberg indicated

that he was going to take something around 9,000 shares?

THE WITNESS: In dollars, it was close to double of mine. In other words, mine was 45, his was 80, 90 thousand. It was a big amount.

THE COURT: He was going to take 80 or 90 thousand dollars?

THE WITNESS: Right.

THE COURT: How about Mr. Adlman, do you know how much money was involved?

THE WITNESS: No. I don't remember either about the fellows from Philadelphia.

Q I take it from your testimony you felt it was important that the full block of 20,000 shares be purchased because you wanted to feel that others were making the same investment decision you were making; is that correct?

A Not only for that reason, but also Mr. Lord and Mr. Burr stressed the point they weren't going to peddle this, two thousand, a thousand shares at a time. This was a 20,000 share block and that was the purpose of the meeting, so that the total shares would be sold or they are not going to sell any piece of it in small pieces.

Q You really didn't know anything about the other individuals? The importand thing in your mind is that this block be sold as a block, is that correct?

A The reason why it was importand to me because what developed when I went down to the meeting, there was a lawyer by the name of Mr. Jacobson and he was very well versed, he appeared to me and he impressed me that he knew what he was talking about and when he laid the ground rules, it was importand that we conform to those ground rules and everybody go in on that basis and that was importand to me, not whether they sold it to anybody else.

THE COURT: Please read the last answer.

(The answer was read.)

Q Isn't it true that that 20,000 share block was in fact sold?

A I don't know.

Q Do you have any basis for believing that it was not sold?

A I can't honestly answer that question. I have no knowledge.

Q Isn't it true in fact that an institutional investor took those 20,000 shares?

A I don't know.

Q Isn't it true that the institutional investor which purchased those other 20,000 shares in fact paid more than you paid?

A How would I know? I have no knowledge at all.

Q Isn't it true that in fact they paid more than you paid after you paid?

A I have no knowledge. I don't even have knowledge of the sale.

THE COURT: Mr. Devine, I constantly charged juries up to and including Monday of this week that one is to draw no inference from the mere asking of questions, so I am drawing no inference from the series of questions you are asking.

Q Mr. Gordon, what was the open market price of Elpac common stock in June of 1968?

A I am not too sure. I think it was somewhere between 16 and 18. I am not positive.

Q What was it in July of 1968?

A It may have been 18, 19.

Q Did you check on the prices during those months?

A Not really. It was told to me by Mr. Lord. I checked on it after I purchased the stock.

Q You didn't even consider it important, did you?

A Not until I paid my money.

Q And you paid $10 per share?

A That is correct.

Q Did you know the price in August of 1968?

THE COURT: Was this an over the counter stock?

THE WITNESS: Yes.

THE COURT: You mean the price of the bid and asked, the price in the pink sheets?

MR. DEVINE: Yes.

Q Did you know the price in the pink sheets in August of 1968?

A No. I can only tell you what Mr. Lord told me.

Q It wasn't importand to you then either?

A It was importand and Mr. Lord told it to me. Why should the man lie?

THE COURT: Did the stock bid and asked appear in the New York Times or Wall Street Journal?

THE WITNESS: I don't think so. I never saw it in the newspapers in New York. I think it was traded on the west coast. I never did see it.

Q What was most importand in your mind in July and August of 1968 was that you purchase at the same price as Howard Mann; isn't that correct?

A Not really.

Q Didn't you originally agree to pay $12 per share for this stock?

A That is correct, sir.

Q Wasn't it reduced to $10 per share?

A Yes, it was.

Q Why was it reduced?

A Because I believe Mr. Steinberg negotiated it out.

Q Steinberg, who?

A Junior.

Q Negotiated that out?

A That is right.

Q Who did he represent in that negotiation?

A The total group, whoever was going to go in on the 20,000 shares.

Q He negotiated it from 12 to ten on behalf of the group?

A I assume so because when I got the telegram for $10 a share, I assumed that was the price that everybody was paying.

Q You assumed it. Did you have any basis for believing it at the time you got that telegram?

A Mr. Steinberg I believe was talking about this to Mr. Burr and Mr. Lord in the office, I believe, they were trying to get the stock down from twelve to ten.

Q What is the basis of your believing that?

A I believe that there was conversation, if my memory serves me right, although the twelve dollar number was not going to deter me if it had to be twelve.

Q If it had to be twelve, you would have purchased

at twelve?

A That is correct, if the group went in and everything was all right.

Q When did this negotiation of the price occur?

A I don't know when it took place. In other words, all I can tell ;you is what was said. He was trying to get it down. I wasn't with him. He saw Arnold Lord whenever he was in town, whenever he was in his office. I wasn't that close to these people.

Q When did you authorize Mr. Steinberg, Jr., to act for you?

A I never really authorized him to act for me, at any time. We just had an understanding and we walked out of Mr. Steinberg's office and in the hall way after going out, I spoke to Stuie and I said, "Stuie, whatever the expenses are, as far as the legal expenses go, I think we should all split it in proportion to the shares we are purchasing to the total," and he agreed and we sort of became partners in the deal or an understanding that we were together.

Q Would you look at Plaintiff's Exhibit 3 --

THE COURT: You said you were going to split legal expenses with Stuart Steinberg?

THE WITNESS: The total group would be spliting the legal expenses.

THE COURT: But you had that conversation?

THE WITNESS: With Stuart Steinberg.

THE COURT: Was that on the day of this meeting in his father's office?

THE WITNESS: Right.

Q Would you look at Plaintiff's Exhibit 3 which is in evidence, I believe it is in front of you.

In particular, would you read the first full paragraph on page 2 to yourself, please.

Doesn't that paragraph make it a condition precedent to your purchase that the consent of the California Commission of Corporations be obtained to the purchase that you were going to make and that if that consent was not obtained within 21 days, you had a right to terminate the agreement?

MR. LOEWINTHAN: I object.

THE COURT: Sustained. The document speaks for itself.

Q Did you ever terminate your agreement to purchase pursuant to the firstfull paragraph of the second page of Plaintiff's Exhibit 3?

A No.

Q You transmitted- your alleged payment for these shares of stock subsequent to 21 days after you signed this

letter; isn't that so?

Would you read to yourself the second full paragraph on the second page of Plaintiff's Exhibit 3 in evidence?

Did you ever ask to enforce the 14 day condition precedent that is stated in that paragraph?

A I asked Mr. Burr and Mr. Lord. Mr. Burr had promised that he would get a personal guarantee that the stock would be registered not later than April 30 of 1969.

MR. DEVINE: I move to strike that answer as not responsive.

THE COURT: Overruled.

Q I ask you again, Mr. Gordon, did you ever cancel this contract pursuant to the second full paragraph of the second page?

A I never made any attempt to cancel the contract. I went through with what I thought was the deal.

Q And more than 14 days after you signed this letter, you paid for the stock?

A That is correct.

Q In June of 1968, how much profit did Mr. Burr tell you that the company was going to make in July?

A He didn't say how much profit. He said the company had turned the corner in June of 1968 and in July of 1968,

the company would make a profit.

Q August of 1968, how much did he tell you the company had made in profit for July of 1968?

A He didn't state a number. He just said the company was making a profit.

Q Did you ask him the number?

A I asked him for a financial.

Q Isn't it true that Plaintiff's Exhibit 3 recites in sub paragraph C of the first page that you had already received the financial statement of the company?

A You are talking about two different financials, number one, but that financial I never received, either.

Q Isn't it true you signed a letter that stated that you had already received that financial statement?

A I signed a letter but there are many things in here that aren't proper, as you stated.

Q Was it your practice in July of 1968 to sign letters that weren't true?

A When I signed them it wasn't a question of an untruth. I did it on a friendly basis and it is true I did want to get into the deal and he assured me this is the routine.

Q In your experience as an accountant, how long does it take to prepare a S-1 for filing with the Securities and Exchange Commission?

A I haven't any idea. I never prepared a S-1.

Q Did you testify earlier in the week you had prepared certified statements for inclusion in a S-1?

A I believe you have it wrong.

Q Did you ever certify financials, financial statements for inclusion in a S-1?

A I believe I never did.

Q Would you accept the proposition that a S-1 takes several months to prepare?

A I can't tell you how long it take to prepare.

Q Do you know what a S-1 is?

A I know of a S-1.

Q For your Elpac stock to be effectively registered as of April 1969, when did you expect work on the registration statment would commence?

A I assumed they would do it in the regular course of business as soon as this transaction took place. It was Mr. Burr's obligation to produce it which he promised.

Q Did you ever check to see whether such a statement was being prepared?

A Did I ever see it?

Q Did you ever check to see it was being prepared?

A All I can tell you what was said to me by Mr. Burr and Mr. Lord, that it takes time and they are processing all

these papers.

Q Did Elpac make a profit or a loss in 1968?

A I don't know.

Q Did they make a profit or a loss in August of 1968?

A I can't tell you. I can tell you that it was told to me they made a profit but I never saw a financial to verify it.

Q When did you find your file which relates to Elpac?

A I didn't find a file. I found many things all over.

Q When did you find it?

A Just the other night.

Q Last night?

A Monday night or Tuesday.

Q Following the conclusion of our deposition, is that correct?

A As you know, I was looking for them all the time.

Q Did you find any of the documents which were included in the notice of that deposition for production at the hearing?

A You have the telegram, the original of the telegram you asked for production of. I believe I brought some other papers that were asked.

Q Were any of these things called for in the notice of the deposition?

A I believe so, yes.

MR. DEVINE: May I ask for their production now?

MR. LOEWINTHAN: Tell me what you want?

MR. DEVINE: Those things that are listed in the notice of depostion.

THE COURT: Let us proceed. I will not waste time with that.

MR. DEVINE: Withdrawn.

Q Mr. Gordon, I want you to be very clear now.

Did you call Mr. Lord? Is it your testimony you called Mr. Lord in January of 1969?

A In or about that time, yes.

Q Where did you call him?

A Excuse me?

Q At what phone number or what place did you call him?

A I either called him at his office at Phillips, Appel or if they told me he was in California, I may have called him over there.

Q Did you call him in March of 1969?

A I believe so, I believe I did.

Q Did you call him at the offices of Phillips, Appel & Walden?

A I may have.

Q You may have or you did?

A I believe I did call him at the beginning of March of 1969. I think that is the time I went down to pick up my stock. It may have been in February, the latter part of February.

Q It was February or March, you are certain of that?

A Yes. Sometime around then.

Q And you called him several other times at Phillips, Appel & Walden in 1969, isn't that your testimony?

A That is correct.

Q Isn't it true that Mr. Lord left the employment of Phillips, Appel & Walden in November of 1968 and isn't all of your testimony false in that regard?

A It is not false, because Mr. Lord got messages at Phillips, Appel and Walden from Mr. James way into 1969, the latter part of the year.

Q Didn't you testify you talked to him while he was at Phillips, Appel & Walden in 1969?

A I may have spoken to him once at his office, in Phillips, Appel & Walden. He may have been visiting or he may have called me, but he said he was at the Phillips, Appel office at the time I had to go down and pick up the stock.

Q When did you graduate from St. John's University?

A I believe September 1965.

Q When did you begin practicing public accountancy?

A I worked for accountants for years.

Q When did you begin?

A While I was going to college.

Q By whom were you first employed in public accounting?

A I couldn't tell you the name.

Q Have you been a public accountant for some 28 years now?

A Approximately.

Q Can you tell the Court very briefly what kinds of matters you worked on as a public accountant during those 28 years?

MR. LOEWINTHAN: Objection. I don't think it is material.

THE COURT: I will permit.

A Tax matters in the regular course of audits, in the regular course of preparing financial statements.

Q At some point in time, did you become self-employed?

A Yes.

Q When was that?

A About 20 years ago, I assume, maybe 22.

Q You were self-employed as an accountant, I take it?

A Right.

Q And you have been continuously self-employed as an

accountant?

A Yes.

Q During those years, have you had associates working for you?

A Yes.

Q In your practice, you have reviewed balance sheets and profit and loss statements?

A Yes.

Q You have prepared documents like that?

A Yes.

Q You know how to read them and interpret them?

A I feel I do.

Q Do you have any corporate clients?

A Yes.

Q Have you conducted audits of corporate clients?

A Yes.

Q Do you audit any manufacturing concerns?

A Yes.

Q Did you ever invest in stocks and bonds prior to your investment in Elpac?

A Yes.

Q When for the first time did you make an investment in securities?

MR. LOEWINTHAN: Objection.

THE COURT: Overruled.

A I can't be sure of the date.

Q It goes back many years?

A I would say possibly 1957, maybe before.

Q 1957?

A '57 or before.

Q In 1957, did you have a brokerage account in any brokerage firm?

A Yes.

Q How many did you have in 1957, if you can recall?

A Maybe 1.

Q From 1957 until the beginning of 1967, a ten year period, did you make investments in securities?

A From time to time.

Q At the beginning of 1967, how much did you have invested in securities?

A Not very much in the beginning of 1967.

Q How many brokerage accounts did you have at that time?

A At the beginning of 1967?

Q Yes.

A Maybe 1.

Q At what firm?

A Allesandrini & Company.

Q Were any of your accounts, or was this account at Allesandrini & Company in 1967 a margin account?

A No.

Q At the beginning of 1968, how many brokerage accounts did you have?

A I may have had two or three.

Q At what firms?

A I had a broker who was moving from one brokerage firm to another and I think I had an account at White & Co. for a period of time; Hertz, Neumark. I may have had an account -- I still have the account at Allesandrini.

Q Did you transact securities business in those accounts in 1968?

A I believe so.

Q How much did you have invested in securities during 1968?

A 1968 I would say about one-hundred thousand.

Q Have you brought with you today the statements of your brokerage accounts during 1968?

A No, I didn't.

Q Have you been able to find them?

A I couldn't find them.

Q How active a trader would you say you were in 1968?

A I wasn't an active trader.

Q Did you trade on a daily basis?

A No.

Q Did you have any margin accounts during 1968?

A I may have.

Q Did you have any margin transactions?

A I may have.

Q You know what a margin transaction is?

A Yes.

Q Will you tell us what your understanding is?

MR. LOEWINTHAN: Objection.

THE COURT: We all know what margin transactions are. Go ahead.

Q Did you purchase any over the counter stocks in 1968?

A Yes, I did.

Q Other than Elpac?

A Yes. I did.

Q How many, do you recall?

A I can't remember.

Q Do you recall the names of any of them?

A I may have purchased -- I am not too sure if it was 1968, Liberty Leasing, Cassette, Jamaica Telephone. I am sure there were other securities.

MR. DEVINE: I have no other questions. I

think some of the other defense counsel may have some questions.

THE COURT: We will do that at two o'clock.

The Court will recess until two o'clock. Have your witnesses.

(Luncheon recess.)

(Afternoon session 2 p.m.)

THE COURT: Take the stand, Mr. Gordon.

All the witnesses in this case are excluded from the courtroom.

CROSS EXAMINATION
BY MR. LIPSITZ:

Q Mr. Gordon, I represent Phillips, Appel & Walden, Inc., one of the defendants in this action.

You previously testified that Mr. Lord was introduced to you as an employee of Phillips, Appel & Walden; is that correct?

A That is correct. He worked for Phillips, Appel & Walden.

Q Was he identified as an employee of Phillips, Appel & Walden in 1968 when you first met him?

A He said he was with Phillips, Appel & Walden.

Q Did he ever say to you at the meeting of June 18 or at any other time, that he was acting on behalf of Phillips, Appell & Walden in the private placement of the stock?

A He never actually stated exactly what you said, but on one of the papers was written Phillips, Appel & Walden, and the transactions were being handled in the Phillips, Appel & Walden's office and I assumed Phillips, Appel & Walden santioned the whole thing.

Q You assumed that?

A Yes.

Q On what basis was this assumption made?

A On the acts of Mr. Lord being an employee of Phillips, Appel & Walden. The papers were signed in the offices of Phillips, Appel & Walden. There was some writing on one of the papers that said Phillips, Appel & Walden.

Q What writing was that?

A On one of the exhibits.

Q Are you referring to Plaintiff's Exhibit 1, the transferee statement?

A May I see it.

Q Is this the statement you are referring to?

A Yes, this is the statement I am referring to.

Q Where is it indicated?

A It says in the second page, sub paragraph E,"I have received advice from the following professional advisors in connection with my proposed in Elpac, Inc." and underneath it is printed "Arnold A. Lord, PA&W,469 7th Ave., New York

City, 10018,"

Q Phillips, Appel & Walden at 469 7th Avenue New York City, is that where Mr. Lord maintained his office?

A I don't know if 469 is the address but his office was within the offices of Phillips, Appel & Walden in the lower level.

Q Is that on Seventh Avenue?

A I believe so, yes.

Q Did anyone else ever tell you that Phillips, Appel & Walden was in any way participating in the private sale of Mr. Burr's stock to you?

A No.

Q Did anyone ever tell you, or do you know whether Phillips, Appel & Walden or Arnold Lord received a commission in connection, or any payment in connection with the sale by Mr. Burr of the stock to you?

A I don't know if he got any money. All I do know is he was making something on the deal that was none of my business.

Q Who, Mr. Lord was making something on the deal?

A Yes.

Q What was Mr. Lord making on the deal?

A He told me he was going to have a big interest in the Elpac Corporation. He was going to be put on the

board and he was going to be retained as an advisor at a very handsome salary.

Q Is that by reason of this particular transaction?

A I don't know if it was this transaction, but I have to assume it is by reason of many transactions, one that came before, and what he was going to do for the corporation.

Q Have you ever had any conversations with any officer, director or person whom you knew to be a shareholder of Phillips, Appel & Walden in connection with the stock of Elpac?

A I really don't know who was a director or a shareholder in Phillips, Appel.

Q Any person whom you knew to be an officer, director or shareholder?

A No.

Q Do you know when Arnold Lord's employment with Phillips, Appel & Walden was terminated?

A Yes, I do.

Q When was that?

A I found out today.

Q When was that?

A I believe the attorney spoke about it this morning and said that he left, if I am correct, sometime in November of 1968.

Q You have testified that you made telephone calls to Arnold Lord after that date, is that correct?

A That is correct.

Q And you called Phillips, Appel & Walden?

A That is right.

Q When you called Phillips, Appel & Walden, did the switchboard operator answer the telephone?

A A girl answered the phone.

Q And you would ask for Arnold Lord?

A That is right.

Q Then what would happen?

A She would say either wait a minute, he is busy or he is not in.

Q I am talking about early in 1969 or at any time after November 1968.

A This is what would happen.

Q They never told you that he was no longer working?

A That is correct.

Q You have testified, I believe, that in March 1969 you went to the offices of Phillips, Appel & Walden and you spoke to Mr. Stuart Steinberg, Jr. at that time?

A That is correct.

Q And you said you were going to see Arnold Lord, I believe, is that correct?

A I said I was going down to pick up my stock and I was going to see Arnie Lord.

Q Did you expect to see Arnold Lord at that time?

A Certainly.

Q Did Mr. Steinberg tell you at that time that Mr. Lord was not working with Phillips, Appel & Walden?

A No, he didn't.

THE COURT: Do you know whether or not Mr. Steinberg was still working there at that time?

THE WITNESS: Yes, he was. He took me into his office.

Q When you attended the meeting in June of 1968 at which were present you testified Mr. Steinberg, Jr. and Mr. Adlman, can you testify that Mr. Adlman and Mr. Steinberg, Jr. were employees of Phillips, Appel & Walden?

A That is correct.

Q Who identified them to you?

A They told me so.

Q Did each person stand up at the meeting and identify himself?

A No. We were taking on the inside. In fact in the inside, in the room, I think it was Stuie Steinberg who said he works for Phillips, Appel and Mr. Adlman works for Phillips, Appel and so did Mr. Lord, or Mr. Lord said it.

Somebody said it. Mr. Lord may have said it that these gentlemen worked with him.

Q Did Mr. Steinberg represent to you at that meeting that he was representing Phillips, Appel & Walden?

A No.

Q Did Mr. Adlman at that meeting represent to you that he was representing Phillips, Appel & Walden?

A No.

Q As far as you know, Mr. Adlman and Mr. Steinberg were there strictly for the purpose of investing in Elpac for their own account, is that right?

A That is true.

Q You testified that in December 1968 you spoke to Arnold Lord and Arnold Lord told you the stock was at Phillips, Appel & Walden?

A That is correct.

Q Was that telephone call with Mr. Lord -- was he at Phillips, Appel & Walden when he told you that?

A He may have been.

Q You don't know?

A I am not sure.

Q Did you call him or did he call you?

A I was calling quite regularly to try to get ahold of him. It may have bee a call back to me or I called him

and got him.

Q Then you went down to pick up your stock and it was not there, is that correct?

A That is correct.

Q And you spoke to a receptionist, I think you said a young lady?

A A girl upstairs, on the street level.

Q Did she direct you to speak to anyone who was an officer, director of Phillips, Appel & Walden?

A She called on the telephone and whoever that person was that she spoke to, made some sort of inquiry and said that stock was not available.

THE COURT: Did that young lady tell you that Mr. Lord was no longer employed by that firm?

THE WITNESS: No, she didn't.

Q Your meeting with Mr. Steinberg was in March 1969, I believe you testified and that took place at Phillips, Appel & Walden, is that correct?

A That is correct.

Q Did you feel in March of 1969 that you had been defrauded in the purchase of the 4500 shares of Elpac common stock?

A Before or after talking to Mr. Steinberg?

Q Before.

A No.

Q You had no indication?

A No. I knew they didn't live up to everything they promised but I didn't feel I was defrauded.

Q Isn't it true, Mr. Gordon, that your deposition was taken in this action on April 5, 1973?

Are you aware of that, that your deposition was taken, I believe on Thursday April 5?

A Yes, I recall that.

Q Do you recall being asked the following question:

"When did you come to believe what you have alleged in paragraph A?"

And you gave this answer:

"This is quite some time after the deal had all been -- I signed the papers and I was now looking for the stock. I went down to Phillips, Appel and Walden to get my stock and I was told, Mr. Lord told me my stock was down there and I went down there. This is quite some time after.

"Q When?

"A In the year 1969 or 1970. Maybe 1970.

"Q Carry on.

"A I found out by accident.

"Q What did you find out?

"A I came down to Phillips, Appel's office to see Mr. Lord and I met one of the gentlemen that was supposedly in the deal. He recognized me and came over to me. He said 'How are you?' I asked him how everything was going. I brought up the point and said, "Boy, we really got taken on that Elpac deal.' He said "What do you mean, we never went into the deal.'

"Q Who were you talking about?

"A This is Mr. Steinberg."

Isn't it true in March of 1969 that you believed you had been taken in this Elpac deal?

A You misunderstand what I was referring to; that the stock never materialized or got to the point that Mr. Lord said it would, but in terms of taken, we made a bad investment.

Q You realized by that time you had made a bad investment?

A It was a bad investment at that time.

Q Did you know what the price of Elpac common stock was in 1969?

A No, I didn't.

Q It didn't interest you at the time?

A I know I couldn't sell it and I couldn't get any of the papers so it didn't mean anything if the price was

high or low.

Q In June of 1968 when you first became interested in purchasing Elpac common stock, were you aware that the stock would be purchased in the open market?

A That it could be purchased?

Q Yes.

A I was told it was a public corporation.

Q I believe you have testified that you had either one or more brokerage accounts in June of 1968?

A That is right.

Q Did you have an account at Phillips, Appel & Walden at the time?

A I don't believe so, no.

Q Were you aware that if you had wanted to, you could have asked Mr. Lord as a registered rep to open an account for you at Phillips, Appel & Walden and purchase Elpac common stock in the open market?

A Certainly I was aware of that.

Q You did not do it, did you?

A No.

Q Did you ever purchase or sell any shares through Phillips, Appel & Walden?

A Does that mean at all times?

Q Any time.

A Yes, I did.

Q Isn't it true that the only transaction that you ever had at Phillips, Appel & Walden was that you caused to be delivered in December of 1969, one thousand shares of Great American Industries, Inc.?

A That is not true.

Q Do you recall ever delivering those shares to Phillips, Appel & Walden?

A I believe the shares were delivered.

Q Do you recall what happened to those shares?

A I got them back.

Q Would that have been on or about January 12, 1970?

A I can't tell you the exact date.

Q Do you remember why you caused the shares of Great American Industries to be delivered to Phillips, Appel & Walden?

A It was a transaction that was going to be handled through Phillips, Appel & Walden. I think it was a new stock and they asked me to open an account and I think I sent the shares down to open an account and put through a transaction.

Q Who was your registered representative?

A I really don't even know.

Q Could it have been George James?

A George James was associated with Arnold Lord.

Q He shared an office with Arnold Lord?

A From what Mr. Lord told me, they were more than just sharing an office. It possibly could have been that Mr. James handled that transaction. It possibly could have been somebody else.

THE COURT: By December of 1969, did you know whether or not Mr. Lord was still employed by the Phillips firm?

THE WITNESS: To the best of my knowledge, he was still employed.

Q You testified that you went down to the offices of Phillips, Appel & Walden to pick up the shares of stock and that you went into Mr. Lord's office and he was not there at the time?

A That is correct.

Q And you spoke to Mr. George James, is that correct?

A Mr. James is correct.

Q Mr. James shared an office with Mr. Lord?

A That is correct.

Q Did Mr. James say anything to you at that time about Mr. Lord, whether or not he was employed or not?

A He didn't say anything. All that he said was he wasn't in. He never said he wasn't employed.

THE COURT: I take it no one ever told you that

Mr. Lord was not employed?

THE WITNESS: That is correct.

Q I believe you testified when you got back from Las Vegas after your trip there in June of 1968 and after you had met Mr. Mann and Mr. Lord in Las Vegas, that you had a conversation with Mr. Mann?

A That is correct.

Q What did Mr. Mann tell you about Elpac?

A It looks like a very nice company, it was a big beautiful building. According to what Mr. Lord told him and Mr. Burr told him, there was a great deal of potential for making a large amount of money.

Q Mr. Mann had visited the plant, didn't he?

A Yes.

Q What type of business was Elpac in?

A They were in some type of electronics business.

Q You didn't know the nature of theproducts other than electronics?

A He once mentioned something to me but I forget what it was.

Q Do you know whether they had more than one line of product?

A They had several things.

Q Do you know whether they had more than one division?

A They may have had several divisions.

Q Did Mr. Mann recommend to you that you buy the Elpac stock?

A He didn't reccommend. He just said if you want a piece, maybe it is available.

Q He said he would try and get it for you?

A He said he would talk with Mr. Lord.

Q Did he say he was pleased with his investment?

A He didn't say he wasn't pleased, and I'm sure he wouldn't have steered me in the wrong direction.

Q Did he tell you how much was raised in the private offerring he was in?

A He mentioned a large number.

Q Could it have been a million dollars?

A I don't remember. It was a substantial number.

Q Did Mr. Mann ever tell you that he thought it looked as though there was a possibility that the company could make a turnaround and become profitable in the future?

A Mr. Mann told me what Mr. Burr and Mr. Lord told him.

Q He said "All that I know is what Mr. Lord and Mr. Burr have told me"; is that correct?

A He told me what was said to him, that is correct.

Q Did Mr. Mann ever tell you he received financials, financial statements about the company?

A I never asked him.

Q Did he ever tell you that he received a private offering brochure or description of the company of any kind?

A I never asked him.

Q He never offered to show you the private offering memorandum which he had received?

A I never saw it.

Q And he never offered it, is that correct?

A Yes.

Q I believe you testified that either Mr. Burr or Mr. Lord have said to you at the meeting on June 18 that they thought the company was going to turn around and could make a profit in July of 1968; is that correct?

A No thought, they made an absolute statement. They said the company was turned around in June of 1968 and from July on of 1968, they would definitely have a profit because they had enough orders on hand to produce a profit.

Q Did you understand him to mean when he said that the company had turned around, that it had prior to that time been operating at a loss?

A I assume so.

Q Did you know how much money the company had lost in

prior periods?

A No.

Q Would it have surprised you if anyone had told you that the company during the first six months of 1968 lost close to $300,000?

A It possibly would have.

Q Would it have surprised you to know that in 1967, the company lost approximately $1,300,000?

A It could have affected the deal, yes.

Q Would it surprise you to have known that in 1966, the company had a net loss of close to $500,000?

A It wouldn't surprise me but it could have affected the deal.

Q Did anybody ever tell you this?

A No.

Q Did you ever ask anybody about the prior performance of the company?

A They told me the company was in debt. I knew it couldn't be making money.

Q Were you aware of the nature of the debt of the company in 1968?

A Not at the time when I went down to the meeting.

Q Did you investigate at any time either prior or after that meeting as to the financial condition of the company?

A I asked for the statements to be sent to me and Mr. Burr and Mr. Lord promised it would be sent.

Q The nature of this action that you are bringing against the defendants is based upon a claim of fraud under the federal securities laws, is that correct?

A I assume so.

Q What acts by Phillips, Appel & Walden, Inc. constitutes the basis for your claim against it?

A They put themselves out to where I understood this transaction was being sponsored by Phillips, Appel & Walden because I know Phillips, Appel & Walden in my eyes enjoyed at that time a very enviable reputation and that they wouldn't be part of anything that was a fraud.

Q What led you to believe they were participating in a private transaction?

A As I said before, it was a representative of Phillips, Appel & Walden. The deal was down in their offices. I saw Phillips, Appel & Walden on the paper that I signed. I assumed that the transaction was being sponsored by Phillips, Appel & Walden.

THE COURT: As a matter of fact, on Exhibit 1 as you pointed out where it asks who is giving you advice or discussing this with you, that paper which was filled in by Mr. Lord included the initials of Phillips, Appel & Walden?

THE WITNESS: That is right.

THE COURT: You didn't write that down, he wrote it down?

THE WITNESS: That is correct.

Q Isn't it true that that was entirely indicated to you as merely his address at the time, that writing on Plaintiff's Exhibit 1?

A Address?

Q Yes, Arnold Lord?

A Again, you ask me a question and did I read the contract. It is under their they are the sponsors and did they give me advice and now you don't want to accept it because it goes against you.

THE COURT: Don't argue with the lawyer.

Q Did you ever ask Phillips, Appel & Walden for a research report on Elpac?

A Never.

Q Did you ever ask if there was such a report available?

A I asked for financial statements from Mr. Arnold Lord and Mr. Burr and Mr. Lord promised he would expedite them from Mr. Burr.

Q He didn't say that Phillips, Appel & Walden had any such documents, did he?

A No, he didn't.

MR. LIPSITZ: May we have this marked for identification.

XXXXX (Defendant Phillips, Appel & Walden Exhibit A, marked for identification.)

Q Mr. Gordon, you have testified, I believ e, that one of the conditions on which you had agreed to purchase the shares from Mr. Burr was that the Department of Corporations, of the California Commissioner of Corporations would consent to the transfer of these shares; is that correct?

A That is correct.

Q I ask you if you have ever seen this document?

A I never saw this document in my live.

May I ask what is the date of that document?

MR. LOEWINTHAN: October 21, 1968.

Q Mr. Gordon, do you know in fact that the California Commissioner of Corporations, or the Securities Commissioner never did grant consent to this transfer of the shares to you?

A I have no knowledge whether they did or didn't.

Q One way or the other?

A That is correct.

Q Did you ever write to any official of the State of California to find out whether or not such consent had

been granted?

A I don't believe so.

Q Did you ever write to anyone at Elpac, the corporation, to determine whether or not such consent had been granted?

A No, but I called Mr. Burr.

THE COURT: What did Mr. Burr tell you?

THE WITNESS: He said they are working on it.

THE COURT: Did Mr. Burr tell you it had been in writing?

THE WITNESS: He didn't make an affirmative statement that it had been granted.

THE COURT: Would you have accepted delivery of stock if you had known that the Commissioner's office had not granted the approval?

THE WITNESS: Absolutely, not.

Q But you did accept delivery of these shares?

A I was glad to get them.

Q Even though you were not aware that the Corporation Commissioner had granted his consent tothe transfer?

A I had no knowledge.

Q Yet you accepted the shares?

A I had to get something. I had nothing in writing.

Q At that point when you received the shares in the

mail, did you ask for your money back because the California Commissioner had refused to grant his consent?

A Not because of that.

Q Did you demand your money back at that time because Elpac itself had refused to consent to the transfer of these shares?

A No.

Q Do you know whether or not Elpac ever did consent to the transfer of these shares?

A I have no knowledge.

Q You have no knowledge whether they did or did not?

A I can only assume they consented because they sent me the shares.

Q You must assume they consented?

A Right.

Q Because they did permit the transfer of the shares to you?

A They had the shares sent to me.

Q The certificate bears the stamp, I believe, of the transfer agent, is that not correct?

A That is correct.

Q And it was sent to you by the transfer agent?

A I assume so.

Q So you assumeed, did you not, that they had consented

to this?

A That is the only assumption I could make.

Q Before the complaint in this action was filed, did you read the complaint?

A Yes, I did.

Q Did you sign the complaint?

A I did.

Q In the complaint you stated on oath that you thought the statements in here were true, except those stated on information and belief?

A That is right.

Q Paragraph 13d of the complaint, it is stated that "The defendant Burr did not receive permission from defendant Elpac to consummate the sale of his stock to the plaintiff."

A That is correct.

Q At the time that yousigned this complaint, you knew that that was not true, isn't that correct?

A I didn't know it was not true. I assumed. Mr. Burr didn't send me any information from the corporation or any other organization that I requested and a s a result of that I could only assume.

Q But you have already stated, had you not, that you had assumed permission had been granted?

A But I had no writing from the authority, from the

California Commission and I never got the letter that he promised me with reference to having the corporation stock registered. I can assume but that doesn't mean I know for a fact. I didn't have any writings in my hands.

Q Did Mr. Burr or Mr. Lord ever tell you how much profit the corporation was going to make in 1968?

A He never said a number.

Q Could it have been one dollar?

A He never said a number.

Q Did it make any difference to you whether it was one dollar or a million dollars?

A Sure it would.

Q But you never askedhow much?

A I requested a statement each month how much money the corporation was making.

Q You didn't ask how much the profits were going to be in July?

A I asked for a statement which would be more specific than a guess.

Q Wouldn't you have been interested in the maximum or minimum amounts it would be making?

A I would know the maximum and minimum when I saw the statement that would be forthcoming from the corporation.

Q On August 21 or 22, I believe you said you caused

your bank to send $45,000 to Mr. Burr's bank in California, is that correct?

A That is correct.

Q At that time you had not received any of the documents which were supposed to have been provided to you under the agreement, is that correct?

A That is correct.

Q Not with standing that fact, you caused your bank to deliver the money to Mr. Burr's bank?

A That is right, on a promise from Mr. Burr and Mr. Lord that they were forthcoming.

THE COURT: According to your direct testimony, you said that Mr. Burr called you in early August and he said everything was fine and that the papers were being expedited and he would get financials to you; is that right?

THE WITNESS: That is correct, sir.

MR. LIPSITZ: No further questions.

THE COURT: Anybody else?

XXXX CROSS EXAMINATION
BY MR. COOPER

Q I am Milton Cooper, attorney for the defendant Burr.

Mr. Gordon, am I correct in assuming from your testimony that the first time you met Mr. Burr was at the meeting at the office of Steinberg and Pokoik?

A That is correct.

Q And that was sometime in June?

A 1968.

Q When was the next time you saw Mr. Burr after that?

A I believe August 22 in my office, of 1968.

Q When did you next see Mr. Burr after that?

A I don't believe I ever saw him again.

Q You spoke with him on the telephone several times?

A That is correct.

Q And you say that you had made attempts to reach Mr. Burr and were unable to in the latter part of 1969?

A In the latter part of 1968.

Q Also in 1969?

A I may have called California in the beginning of 1969.

Q Were you ever able to reach him in California?

A I wasn't able to reach him for some reason or other. After it got a little bit too hot and heavy, he never called me back at all.

Q Did ;you call him in Feb ruary of 1969?

A Possibly.

Q Could you have called him in March of 1969?

A I don't remember.

Q In February of 1969 when you called him, where did you call him?

A I called him at the offices of Elpac corporation,

if I called him in February.

Q Then you don't remember calling him in February positively?

A That is correct.

Q Do you remember positively calling him in January of 1969?

A I can't tell you positively.

Q When do you remember positively having called him last and at Elpac's office?

A I know I spoke to him on the 21st of August and I may have spoken to him sometime after that.

Q How long after that?

A Maybe a month or a couple of months after.

Q So the last time you remember calling Mr. Burr positively at the Elpac office was in September of 1968; is that right?

A There was once I did call and he was at his attorney's at a special meeting and gave me the number there and I don't know if he spoke to me from his attorney's or he called me back, so it wasn't at the Elpac office, it would be at his attorney's office.

Q My question was directed to where you had called him, not whether you had spoken to him.

When is the last time you remember having

called him at the Elpac office, not whether or not you reached him.

A Sometime in 1968.

Q 1968 has twelve months.

A It couldn't be in the beginning of 1968 because I didn't know the man.

Q Please tell me when it was?

A I am not sure.

Q To you best recollection?

A Then I am fairly sure it was approximately in September of 1968 because that was after I sent my money in. That I am absolutely positive about.

Q That is the last time you positively remember calling Mr. Burr, is that right?

A I probably called him many times after that which I didn't get a hold of him but I did call him many times.

Q When was the last time you tried to reach him?

A The last time I tried to reach him was possibly in 1969, early 1969.

Q In January, February, March?

A In the early part of the year.

Q What was the result of that call?

A I nev er spoke to him.

Q Whom did you speak to?

A I believe it was an operator.

Q What were you told?

A He wasn't there.

Q Nothing else?

A That is right.

Q Did they tell you where you could reach him?

A No.

Q Subsequent to that time, you never attempted to reach him by telephone?

A I don't think so. I think the rest of my conversations were trying to get ahold of Mr. Lord because he was in New York and it was much more easier to get ahold of Lord than it was to try to run after somebody in California.

Q The meeting at Steinberg & Pokoik's office, Mr. Jacobson was present, I think you testified?

A That is correct, sir.

Q And he is an attorney and was asking questions?

A He directed the meeting.

Q He directed the meeting?

A In terms of interrogating Mr. Burr as to what his requirements were for the group that would be going into the deal?

Q Did he restrict his questions as to the requirements?

A There were other questions, but basically we are

talking about what would be required of Mr. Burr, the corporation, the California Commission in order to expedite this and have everybody go into the deal.

Q What are the questions that Mr. Jacobson asked?

A If Mr. Burr had the right to sell the stock; that the moneys would not be used by Mr. Burr at all, but would go to pay the corporate debt.

Q That is what Mr. Jacobson asked?

A Mr. Jacobson was asking this, what the funds would be used for and Mr. Jacobson made the statement that Mr. Steinberg require that all the funding to pay off the debt and no funds be used by Mr. Burr personally.

Q Who did Mr. Jacobson represent there?

A When he came in, he represented merely Mr. Steinberg, because I believe Mr. Steinberg was the gentleman who invited him down to meet him.

Q When he came in?

A Yes.

Q Who did he represent when he left?

A When we left, outside of Mr. Steinberg's office, I had agreed with Mr. Steinberg. I believe Mr. Adlman was there and we agreed that any expenses incurred, whatever the total expenses, we would share in proportion to the total stock.

Inother words, if somebody took two thousand, they would take ten percent of the cost, of the 20,000.

Q Did you say you were impressed with Mr. Jacobson's astuteness?

A Yes. I thought he knew a lot about the stock market that I didn't know about.

Q Did Mr. Jacobson ask whether Elpac had lost money the year before?

A He may have asked.

Q You don't remember?

A I can't remember everything. It is almost five years.

Q You weren't interested in that?

A Certainly I was interested.

Q If you had heard at that time that Elpac had lost a great deal of money in the first six months of the year, would that have interested you?

A Sure it would interest me.

Q I take it you didn't hear any such statment?

A I don't remember.

Q But it could have been asked and it could have been answered?

A Possibly.

Q After that I suppose you assumed Mr. Jacobson would

be looking out for your interests more or less?

A Not more or less. He was there to protect Mr. Steinberg's interest and later on he was going to protect all of us when we walked out of that room.

Q Then I think you testified that Mr. Steinberg negotiated in your behalf or in behalf of the group with respect to the price?

A Mr. Steinberg was trying to get the price down from twelve dollars to ten dollars.

THE COURT: Which Mr. Steinberg?

THE WITNESS: Steinberg, Jr.

Q And he was doing that in your behalf?

A I imagine he was doing it for himself too. H was buying a big share of stock so anything he was going to save, I would get a benefit also.

Q And you assumed he was very much interested in the process of receiving the stock and purchasing it?

A He was interested in everything that went on that day.

Q When you didn't get the various documents that you said had been promised you, did you call Mr. Stainberg to ask him whether he had gotten his?

A No, I didn't.

Q Did you call Mr. Jacobson to ask why you hadn't

gotten them?

A No.

Q Did you ask Mr. Jacobson to contact Elpac or contact the California Commission to ascertain whether all these things had been taken care of?

A There was no need to, because the actions had to come from Mr. Burr, not Mr. Jacobson.

Q Don't you think Mr. Steinberg would have been interested in getting the same documents you were promised if he was promised them?

A I wasn't going to get the document directly to my house. The documents were going to go to the attorney as the attorney for the group.

Q You mean Mr. Jacobson?

A That is correct.

Q But you never called Mr. Jacobson?

A I assumed he would be in touch with me as soon as something happened.

Q At the time Mr. Burr and Mr. Lord were atyouf office, that was sometime in August, right?

A Right.

Q And you still had not gotten any of the things that had been promised you, you say?

A That is correct.

Q Yet you signed the transferee statement which is Plaintiff's Exhibit 1?

A You are taking them out of context, counselor. I signed the transferee statement back in July of 1968 and now you are saying to me I didn't get the statements in August but I still signed the statements back in July.

Q I beg your pardon. Before you signed Plaintiff's Exhibit 1 in July of 1968, did you call Mr. Jacobson to ask his permission to sign?

A No, I didn't.

Q Did you call Mr. Steinberg to find out whether he had signed it?

A No. Mr. Lord informed me before I signed it, signed them that everybody had signed them.

Q But you didn't ask Mr. Steinberg?

A No. I don't believe he was in. This was late in the afternoon.

Q When Mr. Burr and Mr. Lord called you and asked you to wire the money to Mr. Burr's bank, which you did?

A Yes.

Q Did you call Mr. Jacobson and ask his permission?

A No, I didn't.

Q Did you call Mr. Steinberg and ask whether he had sent any money in?

A No, I didn't. Mr. Lord and Mr. Burr --

Q Please answer the question.

A Let me tell you what took place.

Q I really want to know whether you called Mr. Steinberg?

A I did not.

Q Did you call Mr. Steinberg or Mr. Jacobson at any time prior to the time you picked up your stock?

THE COURT: Where does that time period begin?

MR. COOPER: Between June 1968 and March of 1969.

Q When you received your stock, aside from the conversation you had with Mr. Steinberg and Mr. Jacobson at the meeting at Steinberg & Pokoik's office, did you contact either one of them with respect to this stock?

A No, I didn't.

Q You were interested in knowing and seeing that all those persons who had committed themselves to purchase stock during the June meeting had indeed purchased the stock, weren't you?

A It was extremely important to me.

Q Because the date of that meeting and the date you picked up your stock, or received your stock in March of 1969, you called neither Steinberg nor the two gentlemen from Philadelphia, nor Mr. Adlman; is that true?

A True. I was told by Lord before I made any type of transaction or actions that everybody had already done the same thing.

MR. COOPER: Move to strike that as not responsive.

THE COURT: Overruled.

Q When you signed the transferee statement and the letter of investment, Plaintiff's Exhibits 1 and 2, you say you read them both?

A I scanned them.

Q Did you find anything in either one of them indicating that the sale would be contingent solely upon acceptance by all this group of the stock offered?

A To the best of my knowledge, it had nothing to do with that.

Q There was no such statement in the agreements, were there?

A Not in those, no.

Q Did you raise the question at the time?

A Mr. Burr and Mr. Lord told me that the deal would not be consummated if we had to sell in alternate pieces. It was 20,000 or nothing.

Q Did you ask him to include it in the agreement before you signed it?

A No, I didn't.

Q You didn't think it was important enough.

A I trusted Mr. Lord.

Q Did you call either Mr. Steinberg or Mr. Jacobson to ascertain what the expenses with that had been entailed in connection with the consummation of this transaction?

A I did not call him.

MR. COOPER: That is all.

THE COURT: Anybody else?

You may step down.

(Witness excused.)

THE COURT: Call your next witness.

MR. LOEWINTHAN: I would like to call Mr. Jacobson.

xxxxx STANLEY JACOBSON, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows.

DIRECT EXAMINATION
BY MR. LOEWINTHAN:

Q What is your occupation, Mr. Jacobson?

A I am an attorney.

Q What is the name of your law firm?

A McLoughlin & Stern, Ballin & Miller.

Q How long have you practicing law?

A A little over ten years.

Q In 1968, were you with the same law firm?

A Yes, I was.

Q In June of 1968, did you atten a meeting in connection with the sale of Elpac stock?

A Yes, I did.

Q Do you recall where that meeting was held?

A I recall it was at Mr. Steinberg's office. I do not recall the specific address.

Q Who was the client of your law firm in connection with that meeting?

A That I will have to explain.

One of my partners received a call from someone --

THE COURT: I think before we go much further, I think we ought to disclose that you and I know one another.

THE WITNESS: Yes.

THE COURT: That is when you were with Gordon, Brady?

THE WITNESS: That is correct and we have now merged.

THE COURT: And I also know your partners, brothers Ballin.

I was unaware this man was going to testify. Of course it has no real effect on the trial of the case but I felt that a disclosure of this kind was indicated because

I have known Mr. Jacobson and I know Irving Ballin and Fred Ballin.

Go ahead.

Q You started to explain.

THE COURT: You attended a meeting in Steinberg's office?

THE WITNESS: Yes.

Q You started to explain how Mr. Steinberg was your client?

A Yes.

One of my partners received a call from someone we honestly cannot recall at this time and they had recommended us to Mr. Steinberg in connection with this matter and --

THE COURT: Which Mr. Steinberg?

THE WITNESS The younger one. I don't really recall his name but the younger one.

A We were asked to attend a meeting at his office, one afternoon in June and I did in fact attend that meeting.

Q Would the name Steinberg and Pokoik mean anything to you?

A No.

Q Do you recall where the meeting took place?

A Other than in Mr. Steinberg's office, no, I don't

recall.

Q Would 575 Madison Avenue refresh your recollection?

A Not really.

Q Do you recall who was present at that meeting?

A I recall there were about, approximately six or seven people who attended the meeting. The only specific names I remember being there were the younger Mr. Steinberg, Mr. Gordon and Mr. Robert Burr.

Q How about Steinberg, Sr.?

A I don't recall him, whether he was or wasn't there.

Q Do you recall whether Mr. Lord was there?

A Not specifically, no.

Q Do you recall whether or not there were two people from Philadelphia at that meeting?

A No.

Q Does the name Greenberg mean anything?

A No.

Q Will you tell me again which names you do recall?

THE COURT: Young Steinberg, Gordon and Burr.

Q Did you meet Mr. Gordon at that meeting for the the first time?

A Yes, I did.

Q Will you tell us to the best of your recollection, what took place at that meeting?

A The discussion at the meeting related to Mr. Burr selling certain of the people at the meeting some of his stock in Elpac Corporation, in what I would call an investment transaction. They would take for investment.

The discussion related to the requirements preceding this purchase. Basically since it was a California corporation and the necessity of consent of the California Commission. There was also discussion as to what registration rights these individuals, these individual purchasers would get to the Elpac stock they were buying and the only specific recollection I have about that, I raised the question of the fact there would be the necessity of at least a Board of Directors resolution authorization of these registration rights since the corporation was not the seller of the stock.

That is basically my recollection of the meeting.

Q Was there any question raised as to the time when the registration would be made.

A I don't specifically recall anything about that.

Q Did you require Mr. Burr to guarantee that the stock would eventually be registered?

A You say guarantee. I don't specifically know what you mean by guarantee.

THE COURT: Was the subject of registration of the stock disucssed at that time?

THE WITNESS: Yes.

THE COURT: Tell me what was said about registration?

THE WITNESS: The proposed purchasers indicated they would want a registration of their stock in order to be albe to sell it publicly. As I said before, I said it would require at least a board of directors resolution to authorize this agreement because Mr. Burr had not authorized it on his own behalf and as I recall the meeting breaking up, among the things that were to be obtained was some sort of board resolution, there was to be delivered some purchase agreement, I don't know what form, the question of California's Commissioner consenting was to be explored and there were other things left to be done and I assume, though I can't say to my knowledge, there was supposed to be some future meeting or further discussions on this matter.

Q When the consents and the permission was obtained, were they to b e sent to your office?

A My understanding was that the documentation was to be sent to me, yes.

Q Did you ever receive any of that documentation?

A We have checked our records and we have no record

of receiving any documentation of any kind.

Q When for the next time did you ever meet Mr. Gordon other than today in Court?

A I believe it was some months later. I don't recall specifically when it was but he did call me and ask to come to see me sometime after that initial meeting. At least some months later.

Q Did you see him at your office?

A Yes, I did.

Q Will you tell the Court what you said to him and what he said to you?

A I can't specifically say that but I can tell you my recollection of the meeting. Mr. Gordon indicated to me that he had made an investment in Elpac Corporation, that he was unhappy with his investment. I don't recall the exact reasons he was unhappy and he asked if we would represent him in a law suit against Phillips, Appel & Walden among other defendants and I said we would not.

Q Did you tell him why?

A Yes, basically because in 1968 and 1969 my firm was heavily involved in doing securities work and we felt it would be ill advised for us to get involved in suing a brokerage house, specially for someone who was not a regular client of the office.

Q Did this have anything to do with the merits of the case?

A I don't recall even knowing what the merits of the case were.

MR. DEVINE: Objection to that question and answer.

THE COURT: Yes. Sustained. Strike the answer.

Q Did you ever tell Mr. Gordon that Mr. Steinberg had refused to go into the deal?

A No.

Q Did you ever tell Mr. Gordon that any of the other persons at the meeting on June 26, 1968 had not gone into the deal?

A No, I could not because I did not know that.

THE COURT: Anybody?

MR. DEVINE: I think it is the consensus at the defense table there is no cross examination of this witness.

MR. LOEWINTHAN: One other question.

THE COURT: Yes.

Q Do you recall any conversation at all as to the use of the moneys for the purchase of the stock?

A No, I do not.

MR. LOEWINTHAN: No further questions.

THE COURT: You are excused.

(Witness excused.)

THE COURT: The Court will take the afternoon recess.

(Recess.)

THE COURT: Call your next witness, please.

MR. LOEWINTHAN: Howard Mann.

HOWARD MANN, call as a witness on behalf of plaintiff, being first duly sworn, testified as follows.

xxxxx DIRECT EXAMINATION
BY MR. LOEWINTHAN:

Q Mr. Mann, what is your occupation?

A I am in the jewelry line.

Q How long have you been in that business?

A Since 1957.

Q Do you know the plaintiff, Mr. Gordon?

A Yes, I do.

Q How long do you know Mr. Gordon?

A All my life.

Q Did there come a time in 1968 when you met Mr. Gordon in Las Vegas?

A Yes.

Q Would you know approximately when that was?

A It was about in the summer. It was around June or

July.

Q Of 1968?

A Yes.

Q Who were you with?

A Arnold Lord.

Q How long do you know Mr. Lord?

A Since about 1967.

Q Where had you come from when you were in Vegas?

A We had been out to California and we had gone down to Newport Beach at Irvine to look at Elpac.

Q You saw the Elpac factory?

A Yes, I did.

Q When you met Mr. Gordon in Vegas, was there a discussion in connection with Elpac?

A Yes, there was.

THE COURT: Where was this, at the airport?

THE WITNESS: In the hotel lobby.

THE COURT: Caesar's Palace?

THE WITNESS: Yes.

Q What did you say or what was said at this discussion in Caesar's Palace?

A Basically, just the fact where we had been, what we had looked at and how Elpac looked promising and that I also invested in Elpac.

Q Did you tell Mr. Gordon at that time that you had participated in a private placement?

A I believe I did, yes.

Q Was anything mentioned at that time about another private placement?

A I don't think so. I am not sure. I don't think so.

Q When next did you talk to Mr. Gordon?

A Within the next month, after that in New York .

Q Do you recall the conversation you had with respect to Elpac that you had on the telephone with Mr. Gordon?

A Yes.

Q Would you recall what was said, what you said to him and what he said to you?

A I don't remember, word for word.

Q Just the substance.

MR. COOPER: I object to any conversation between Mr. Gordon and Mr. Mann.

THE COURT: Sustained.

How is any defendant bound by a conversation between Mr. Gordon and Mr. Mann?

Sustained.

Q Did you discuss with Mr. Lord a participation for Mr. Gordon in the Elpac placement?

A Yes.

Q What did Mr. Lord say to you -- when was that?

A Within the next few weeks. three, four weeks, perhaps.

THE COURT: Three or four weeks after you had had the conversation in Las Vegas?

THE WITNESS: Yes. Within a month.

THE COURT: After Las Vegas?

THE WITNESS: Yes.

Q What did you say to Mr. Lord and what did he say to you?

A I had been speaking to Mr. Gordon and I mentioned I was in this case with Elpac and I had asked Arnold if there was any way I could get Gordon into it.

Q "Arnold" is Mr. Lord?

A Mr. Lord, right.

Q What did Mr. Lord say?

A He said there was a group of people that were going to buy some shares and he would see what he could do about getting Irving Gordon included in that.

Q When after that conversation did you next speak to Mr. Lord on the telephone or face to face?

A I spoke to him every couple of days.

Q Were you very friendly with Mr. Lord

A Yes, at that time.

Q Did there come a time when you discussed the second private placement with Mr. Lord?

A Yes, of course.

Q Did you do this by telephone or was this face to face?

A I imagine it was face to face.

Q What did he say to you --

A I spoke to him on the telephone as well.

Q Would you know approximately when this conversation took place?

A Somewhere around that time, after that meeting in Las Vegas, at the time when he was going to see if Irving Gordon could be included in buying the shares.

Q What did he say to you at that time and what did you say to him?

THE COURT: He said he would see what he could do.

Q Did there come a time when you spoke to him again in connection with the second placement?

A I was speaking to him constantly. I was friendly with the man for quite a while and as things progressed with Elpac, I was interested for my own as well as for Irving Gordon being involved in it as to the progress of

the company.

As far as Irving Gordon is concerned, he told me there was a group and that there was some sort of meeting of a group and he mentioned the fact that this group was going to buy these shares and Irving Gordon, he would allow him to come in and buy a certain amount of shares.

Originally I think it was supposed to be 5000 then it turned out to be 4500 for some reason or another.

Q Did Mr. Lord tell you that the group was going to purchase the entire Burr offering?

A Burr offering, I am not sure exactly how the offering was. I know there were to be some shares sold and he would allow Gordon to be in the group and buy it as well.

Q Did there come a time in the summer, the late summer, say August of 1968, when you again spoke to Mr. Lord in connection with this second private placement?

A Only to the effect that Irving Gordon had sent the money in and that the rest of the group had also bought these shares and that everything was taken care of and everything looked fine as far as the company was concerned.

Q Did Mr. Lord ever tell you that he received any remuneration whatsoever for his participation in this second private offering?

A No, he never did.

Q Did you know whether or not Mr. Lord was ever a director or officer of Elpac?

A Yes, he was.

Q He was what?

A He was on the board of directors.

Q Approximately when?

A After the summer.

Q Of 1968?

A Yes. It may have been after the fall. I was present when there was some sort of board meeting with Graham Loving and Arnold Lord and I was excluded from the meeting and I waited in the lobby at the Beverly Hills while they had the meeting. I had gone out there with him.

Q Did Mr. Lord ever tell you he was a consultant for Elpac?

A Yes.

Q And you never discussed remuneration as to whether or not he received any salary or any moneys?

MR. COOPER: Objection.

MR. DEVINE: That has been asked and answered.

THE COURT: Overruled.

A Yes, but as far as him actually saying what he was getting or in any way, I understood he was going to work

something out as far as getting shares.

Graham Loving at that time was not supporting the company in a way financially or otherwise and he was going to help the company by giving up some shares. It was something to that effect and perhaps Arnold Lord was going to get some and he was going -- he mentioned the fact he had a lot of expenses and he was going to try to get some of that money back and he said he should get something as a consultant and I don't know whether he did.

Q After August 1968, did you have disucssions with Mr. Lord with reference to Mr. Gordon's stock?

A Yes.

Q Will you tell the court what you said to him and what he said to you and if possible, identify the date or the time, as best you can?

A As far as the date and time, I don't remember exactly when. I just know it was after the time Mr. Gordon had paid for the stock and Mr. Gordon had called me and told me he still hadn't gotten his certificates and mentioned that because of me, he asked me -- originally when he had gone into the deal he asked me about Arnold Lord and I told him my opinion of Mr. Lord and I told him he is very reliable and there was nothing to worrry aobut and he said he would never go into a deal in this way and I gave him confidence to

go into into because of my association with mr. Lord, we were very close friends at the time, and afterwards Mr. Gordon asked me for the certificates and I guess he had been asking Mr. Lord also, but since I spent more time with Mr. Lord, I guess he asked me to please ask him also and he told me they would be forthcoming as far as the certificates went.

Q I didn't get that.

A You asked me about the certificates, right?

Q Yes.

A He told me he would have the stock for him very shortly.

Q Who told you that?

A Arnold Lord. That the stock would be available for Irving Gordon.

Q When did you next speak to Mr. Lord in connection with the second private placement?

A Very shortly afterwards he mentioned that the group had all bought the stock.

THE COURT: When did he say that to you?

THE WITNESS: At the time Mr. Gordon had put the money up, that week, I guess.

THE COURT: Would you try to fix the date for me, please?

Q Mr. Mann, if I said the end of August, would that be approximately right?

A It sounds right but I don't know exactly. All I remember is that Arnold Lord had told me that Irving Gordon had put up his share of the money and the rest of the group had also.

Irving Gordon also told me he paid for the stock and also mentioned the fact this was a crazy way to do it but he was doing it because it was a chance to make a lot of money.

Q Did there ever come a time you tried to contact Mr. Lord in connection with the second private placement and Mr. Gordon's participation therin after March of 1969?

A After March. Well, Irving Gordon had called and told me that he had met somebody, Stuart something, Steinberg, or he had met some man at Phillips, Appel and had mentioned -- who was originally supposed to be part of the group and mentioned that the group didn't buy the stock and he told me of this whereupon I tried to get in touch with Arnold Lord. I think he might have been out of town at that time. Eventually I spoke with him and he said he would try to work something out with Irving, that everybody is going to make a lot of money and not to worry about it, it wasn't important.

Q How many times did you call Mr. Lord in connection

with this'

A I spent time with him as well as call him. I called him every few days and I would speak to him over the phone, socially, if not --

Q I am talking mainly in connection with the Gordon investment in Elpac?

A The think is, I spoke to him in person as well as on the phone. I don't know exactly how many times. I can't pin it down like that.

Q Would you say more than 20 times?

A No, I didn't belabor the point.

Q Would you say ten times?

A I must have mentioned it at least a half-dozen times.

THE COURT: I want you to pay particular attention to what I am going to ask you.

You had a conversation with Mr. Lord in which you told him, in substance, that Mr. Gordon had told you that he had found out that the other people in the group had not paid for their stock; is that correct?

THE WITNESS: Right.

THE COURT: What if anything did Mr. Lord say when you said that? Did he say whether they had paid, they hadn't paid?

THE WITNESS: He didn't deny it.

THE COURT: He didn't say either way or did he say they had not paid? What did he say to the best of your recollection?

THE WITNESS: He agreed with it. He agreed with the fact they hadn't. He said it didn't make any difference because there was a lot of money to be made by everybody.

THE COURT: Lord told you that the others hadn't paid for their stock?

THE WITNESS: As far as I remember.

THE COURT: But it didn't make any difference because everybody was going to make a lot of money?

THE WITNESS: Yes.

THE COURT: Go ahead.

Q How many times would you say you contacted Mr. Lord in 1970 in connection with this?

A I don't think I did. Maybe once. I think by 1970 we hadn't kept in touch that often and it was sort of a dropped issue. We just didn't discuss it that much.

Q One other question: Did you know that in the latter part of November of 1968, Mr. Lord was no longer employed by Phillips, Appel & Walden.

A Yes.

Q When you called him on the telephone after November 28 or 29, 1968, where did you call him?

A Well, I would call him at home or sometimes he would be in George James' office, the office he occupied before when he was with them.

Q Was he very close to George James? Did you know the relationship, that is, between Mr. Lord and Mr. James?

A Yes. I think they worked together on almost everything they did.

Q And you contacted him at Phillips, Appel & Walden in the latter part of 1968 and 1969?

A Yes.

THE COURT: Would you know whether or not Lord and James traded under the same RR number at the Appel firm?

THE WITNESS: You mean under their own account?

THE COURT: In most brokerage houses, each RR has a number. Sometimes two RRs in smaller houses from partnerships and they trade under the same one number; do you know about that?

THE WITNESS: I wouldn't know for sure.

THE COURT: If you don't know, don't speculate.

THE WITNESS: There was an occasion where they were looking up their commissions and each one had a separate sheet. I think I remember seeing that in the office.

Q Was it ever mentioned that Mr. James and Mr. Lord were partners?

A Oh, sure.

Q They were partners?

A Yes.

Q Who told you that?

A They themselves. Arnie Lord many times told me that his income was a little low and because George wasn't doing that much business.

THE COURT: He told you many times that he and James were partners?

THE WITNESS: Yes. In fact -- Occasionally I was dealing with Phillips, Aspel through another broker, a partner in the firm, actually, Monty Bier, and I even asked how George James was doing businesswise, because I was friendly with Arnie Lord at the time and I thought that George James was short changing him.

MR. LOEWINTHAN: No further questions.

XXXXX CROSS EXAMINATION
BY: MR. DEVINE:

Q Mr. Mann, does the name Diebdd Technology Venture Fund Inc., mean anything to you?

A No, except for the fact Mr. Loewinthan has asked me also if I had heard of that name.

Q Did Mr. Lord ever tell you that that fund had

purchased 20,000 shares of Elpac stock?

A I don't remember. He might have. I remember he was going down to Wall Street seeing some people. There was a man in particular that was very well known in the hedge funds.

Q Does Frank Smith refresh your recollection at all?

A If it has to do with Smith, Jackson, because I remember he was seeing some people there.

Q The private placement of Elpac stock which you participated in in the spring of 1968, do you recall that?

A Surely.

Q Did you receive any documentation in connection with that private placement?

A Only one piece of paper. I had taken a half interest in a share of one hundred dollars worth with Donald Fainberg of Mt. Kisco,, New York. He just gave me a letter saying that I owned a half interest in his stock, which was ten thousand shares, I think, I had 5,000.

Q Did you receive a financial statement of Elpac in connection with that private placement?

A I don't think so.

Q Did you attend a due diligence meeting in connection with that private placement?

A I think so.

Q Did you hear at that due diligence meeting that the company had had a loss in the previous period?

A I can't remember for sure.

Q What was your understandint at the time of that due diligence meeting as to whether or not Elpac was profitable?

A To the best of my recollection I remember that some people had gotten up and mentioned that this was an investment that was speculative and the fact, although many positive things were said, it was a risk.

THE COURT: Where did this meeting take place?

THE WITNESS: They had some sort of a conference room in Phillips, Appel on 7th Avenue, 35th or 36th Street.

THE COURT: Who addressed that meeting?

THE WITNESS: I am not exactly sure. I am not sure if Mr. Burr was there. Arnold Lord was there, George James, Jerome Kern who was an attorney.

THE COURT: Who was he the attorney for?

THE COURT: I think he was the attorney for Phillips, Appel.

THE COURT: All these people were there at this meeting and they were telling you about the situation?

THE WITNESS: They told the group. I wasn't really part of the group because I wasn't in effect the

actual name that was on the buyers of the stock but they allowed me because Arnold Lord had told them I actually had an interest even though it wasn't on record.

There was a Henry Feldman, he had bought a large position and some of the other people had bought. I don't know if all the people were there, but quite a lot of them.

Q There has been testimony here that in the spring of 1968, you visited Elpac plant in California, is that correct?

A Yes.

Q Did you talk to Mr. Burr at that time?

A Yes.

Q Do you recall what you talked about with Mr. Burr?

A No. I just remember being there. I don't remember exactly. I remember being at the plant and being shown a drilling machine which I had taken pictures and shown around the plant. I am not sure whether Mr. Burr was right there at that time. I remember meeting Mr. Burr. I don't remember whether it was in L.A. or there. I think it was probably there.

Q During this visti to the plant in California, did you attempt to inform yourself about Elpac as well as you could?

A As far as paper work and the financials, not in that way. Just looking around the plant to see how busy it was. They sent a plane up to Los Angeles to pick us up and the girl that worked there was a pilot and picked up Arnold Lord and myself and brought us tothe plant.

MR. DEVINE: That is all.

xxxxx CROSS EXAMINATION
BY: MR. COOPER

Q When Mr. Lord told you not to worry about it, the fact that these other people had not purchased stock, didn't he say that you didn't have to worry about it because Diebold had purchased 20,000 shares of stock?

A I don't recall the name Diebold at all.

Q Did he tell you that other people had bought some of the stock?

A I don't remember him saying that.

Q But he may have said it?

A The whole climate of the situation was, we were in a very good situation and there was a lot to be done. There was really nothing to be concerned about and as far as the details, he shrugged it off as not bing important, and I was satisfied because at that time I was very confident, I had a lot of confidence in him and there was some proposed mergers with a company in the south east United States which came into effect later, I believe.

Q Had you known that the company had lost money in the first half of the year?

A Yes, but at that time when I first invested, at that time it was right on the brink of going into the black. I think that was brought up at that meeting.

Q At the time you spoke to Mr. Gordon for the first time, had you known that the company had lost money the first half of the year?

A It hadn't had made money as far as I remember.

Q It had lost money the first half of the year?

A Yes.

Q You had known that?

A Yes.

Q When you spoke to Mr. Gordon about the stock the first time, you knew that?

A Yes, because in one particular instance he mentioned it was just turning into the black as of a certain period and the next month the figures would be in the black.

THE COURT: Who told you that?

THE WITNESS: Arnold Lord. He said they were actually making money at that time but it wouldn't show up until the next month because they already had losses for that month. It was at the time that Irving Gordon went into it and I think it was at Irving Gordon's office, too.

MR. COOPER: All right.

xxxxx CROSS EXAMINATION
BY: MR. LIPSITZ

Q You testified you attended a meeting at the offices of Phillips, Appel & Walden in connection with your investment into the Elpac stock?

A Yes.

Q Was Mr. Jerome Kern there?

A I think I remember him being there.

Q Do you recall Mr. Kern making a statement to the group?

A Yes.

Q Do you recall there being a reporter present?

A I don't remember if there was or not.

Q Do you recall Mr. Kern saying to you that Phillips, Appel & Walden has a special obligation in this situation to fully apprise you of all the facts before you go ahead and make this investment?

Do you recall him saying anything like that?

A It was academic, the situation. My whole reason for being in Elpac was because of my confidence in Arnold Lord's analysis of the company and my confidence in him. I wasn't really interested in what had to be said at the meeting. I didn't make a point of trying to remember what was said. I didn't think it was of any value.

Q do you recall Mr. Kern stating that he might add that he was there as counsel to the firm? Did he identify himself as an attorney?

A I wouldn't remember. It was unimportant to me.

Q Do you recall Mr. Kern stating that Phillips, Appel & Walden was not going to make a gain out of your investment?

A I don't remember anything like that. I wouldn't remember if it was said or not.

MR. LIPSITZ: No further questions.

THE COURT: When did this meeting take place?

THE WITNESS: At the time I put up my money for for the date.

Q Does May 15, 1968 refresh your recollection?

A Yes.

THE COURT: Is that about it?

THE WITNESS: Yes.

xxxxxx RE CROSS EXAMINATION
BY: MR. COOPER

Q At this due diligence meeting, the offering was made of Elpac stock by Elpac, Inc., is that true?

A You mean whose shares were being put up?

Q Yes.

A I don't know. I assume that. I guess so.

THE COURT: If you don't know.

THE WITNESS: I don't know, but I assume that.

The company was getting the money as far as I understood.

THE COURT: Anything else?

MR. DEVINE: No further cross.

MR. LOEWINTHAN: Nothing further, except that we have one more witness. I couldn't get in touch with him. I had made arrangements to call him tomorrow morning at 7:30 and to advise him whether or not he can come down here and I didn't anticipate because of the length of the EBTs that we would be this short in time.

It is now a quarter of 4 and if I ask your Honor to adjourn now --

THE COURT: I am not going to do that but I will ask defense to go forward.

You have just one more witness?

MR. LOEWINTHAN: I have Stuart Steinberg.

THE COURT: I will hear you tomorrow morning.

MR. DEVINE: We would prefer not to go forward with our case until we hear the plaintiff's case in full.

THE COURT: I am going to recess now until ten o'clock tomorrow. I warn you that if you don't have all your remaining witnesses here at ten o'clock tomorrow morning, you are through.

MR. LOEWINTHAN: He will be here at ten o'clock in the morning if he is coming. I will call him at 7:30 in

the morning.

THE COURT: Is there anything else further before I close the record?

The record is closed.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

IRVING GORDON

Plaintiff

against 71 Civ 1285

ROBERT L. BURR, ET AL

Defendants

----------x

April 12, 1973
10 a.m.

Before: HON. ARNOLD BAUMAN, D.J.

(Trial resumed.)

THE COURT: Call your next witness, Mr. Loewinthan.

MR. LOEWINTHAN: Mr. Steinberg.

STUART STEINBERG, call as a witness on behalf of plaintiff, being first duly sworn, testified as follows.

THE COURT: Again, I want to apologize for holding you up this morning.

Go ahead.

DIRECT EXAMINATION
BY: MR. LOEWINTHAN

xxxxx

Q Mr. Steinberg, what is your occupation?

A Currently unemployed.

Q Were you at one time employed by Phillips, Appel & Walden, one of the defendants in this case?

A Yes, I was.

Q Do you recall whether or not you were employed by Phillips, Appel & Walden in June of 1968?

THE COURT: In what period of time were you employed by Phillips, Appel & Walden?

THE WITNESS: I was employed roughly February, March 1967 through October 1969.

Q When did you first meet Mr. Gordon, the plaintiff in this action?

A I met Mr. Gordon in a meeting at 575 Madison Avenue at Steinberg & Pokoik in the spring of 1968.

Q Is Steinberg of Steinberg & Pokoik your father?

A Yes.

Q Was he present at the meeting?

A Yes, he was.

Q To the best of your recollection who was present at that meeting?

A Myself, my father, Mr. Lord, Mr. Burr, Steven Greenberg, an attorney who I don't know and two other gentlemen that I don't think I know.

Q Why were all of these people present at the meeting?

A There was a possibility that we were going to purchase from Mr. Burr, Elpac Stock.

Q How much was your group prepared to purchase?

MR. COOPER: I object to that.

THE COURT: Sustained.

Tell us what happened at the meeting.

A As the meeting took place, Mr. Greenberg who is a friend of mine told me about Elpac stock, the situation, and the possibility of purchasing stock, unregistered stock less than the market value and we came to that meeting to listen to the situation and the possibility of purchasing $80.000 worth of stock.

THE COURT: You?

THE WITNESS: Myself and my father.

Q Do you recall whether or not a question of registration of the stock was discussed?

A Yes, it was brought up.

Q Will you tell the Court what was said?

A We wanted to know that we would be guaranteed registration rights on the purchase of the Elpac stock.

MR. COOPER: Excuse me.

May I ask that the witness be directed to answer as to conversations rather than what he wanted to know?

THE COURT: I will tell you what, Mr. Steinberg, why don't you tell us everything you remember about that meeting then if counsel wants to direct yourattention to something, he can do it after you have gone ahead. Tell us everything you remember about the meeting?

A We attended this meeting and Mr. Burr and Mr. Lord were present and we were interested in buying $80,000 worth of this stock at a price of twelve. However, that was the price they wanted to sell at. We were not interested in paying that amount of money. We wanted some kind of a guarantee that the stock would have some kind of registration rights for some short term in the near future.

We were also told the company was about to turn the corner and go into the black for the first time.

THE COURT: Who said that?

THE WITNESS: Mr. Burr.

A (Continuing) And that there was -- I don't remember the figures but there was some kind of a backlog of orders at that time. The company prior to this had been running at a deficit.

In essence, that is what happened at the meeting.

Q Do you recall whether anything was said about the necessity for the consent of the Commission, Commissioner of Corporations in California?

A Yes. That was one of the stipulations. We wanted to be sure that everything that was happening was legal, that Mr. Burr was allowed to sell his stock being it was unregistered and we wanted a letter saying such.

THE COURT: From the Commissioner of Corporations?

THE WITNESS: Yes.

Q After that meeting, when for the next time did you see Mr. Gordon?

A Several months later.

Q Where did you see him?

A At Phillips, Appel & Walden.

Q What did you say to him and what did he say to you?

A The gist of the conversation was that he asked me

what I thought about the deal and I told him I really have no interest because I wasn't involved and he seemed sort of surprised that we had not gone into the deal.

Q What happened after you said you had not gone into the deal?

A He appeared surprised --

MR. COOPER: I object to this line of questioning as not binding on any of the defendants, the conversatio n between Mr. Steinberg and Mr. Gordon not in the presence of any of the defendants.

THE COURT: Sustained.

Q Did you ever tell Mr. Gordon that you did not go into the deal?

A I told him on that day.

THE COURT: Quite aside from whether or not you told Mr. Gordon, the fact of the matter is you did not, you and your father did not buy any of this Elpac stock, is that correct?

THE WITNESS: That is correct.

THE COURT: At the meeting you were discussing the possibility or your interest in, perhaps $80,000 worth under certain conditions?

THE WITNESS: Correct.

THE COURT: But there came a time when you

and your father decided you were not going to go ahead?

THE WITNESS: At this meeting it was not told at this meeting we were not going to go ahead. It was sometime later.

THE COURT: But you didn't say that in the meeting?

THE WITNESS: Correct.

THE COURT: At this time you were with Phillips, Appel?

THE WITNESS: Correct.

THE COURT: Were you a registered representative

THE WITNESS: Yes, I was.

THE COURT: Was Mr. Adlman a representative?

THE WITNESS: Yes.

THE COURT: And Mr. Lord was a registered representative?

THE WITNESS: Yes.

THE COURT: Was he an officer in addition to being a registered rep or was he just an RR?

THE WITNESS: As far as I know, just an RR.

Q Was anything said at the meeting as to the use of the funds?

A Yes. Mr. Burr, I believe owed the bank -- I think Elpac owed the bank money and Mr. Burr had co-signed a note

and this money was going to be used to somehow repay the bank note that was owed by Elpac.

THE COURT: The bank loan on which Mr. Burr was a co-signer?

THE WITNESS: I believe so.

MR. LOEWINTHAN: No further questions.

Excuse me, just two more questions.

Q Did you at my request call a stock broker this morning?

A Yes, I did.

Q Did you ascertain what the stock closed at yesterday?

MR. COOPER: I object.

THE COURT: I am interested. I will hear it.

A It bid 3 5/8, asked 4 1/8.

THE COURT: It is so simple to prove that from the pink sheets which are admissible in evidence, why worry about it. I would admit the pink sheets showing today.

Go ahead.

Q Do you know of your own knowledge whether or not there was ever a reverse split on that stock?

A Yes, I believe there was a one for ten reverse split about a year, year and a half ago, two years ago.

Q If I tell you that Mr. Gordon had 4500 shares, how many shares would he have today?

THE COURT: Obviously 450 shares.

Q If it was selling at three and a half dollars --

THE COURT: I can do the arithmetic even without one of those electronic machines they sell.

MR. LOEWINTHAN: No further questions.

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CROSS EXAMINATION
BY: MR. COOPER

Q Mr. Steinberg, you say that Mr. Burr stated at the meeting that the company had been operating at a deficit for the past several months?

A That is correct.

Q And Mr. Gordon was present at that meeting?

A Yes.

MR. COOPER: That is all

XXXXXX

CROSS EXAMINATION
BY: MR. GEIST

Q Mr. Steinberg, at that meeting --

THE COURT: Who do you represent?

MR. GEIST: My name is Alan Geist. I represent the defendant Elpac Corporation.

Q Mr. Steinberg, at that meeting, whose shares were being offered?

A Mr. Burr's shares.

MR. GEIST: That is all.

MR. DEVINE: No further cross examination.

THE COURT: You are excused, Mr. Steinberg. You may step down.

(Witness excused.)

MR. LOEWINTHAN: Your Honor, the plaintiff rests.

MR. DEVINE: If I can be heard briefly, I would like to make two motions on behalf of defendant lord.

The first motion is to amend the answer as filed in this case to add three defenses which we fell will conform the pleadings to evidence that has been presented in the plaintiff's case.

The three defenses we would like to add are laches, the equitable defense of laches, in that the plaintiff knew at the latest in very early 1969 of what he is alleging in this case and this case was not commenced until 1971.

THE COURT: It is within the statutory period.

MR. DEVINE: It is an equitable case. We fell the defense of laches is applicable.

The second defense we would like to add is the fact there are indispensible parties who are not present and part of this action as I mentioned at the opening of the case as a preliminary motion and the third defense is that Mr. Gordon is not a proper plaintiff in that he does not own the 4500 shares that he swore in his complaint he did own.

He did not purchase the 4500 shares.

THE COURT: Isn't he the owner of 3000 shares?

MR. DEVINE: I think this is a subject to be determined.

THE COURT: So far as on the record as it stands now, and he may indeed be the owner of record of 4500 shares and that would appear to be so from what I have heard so far by his own statement and that a variety of people gave him the money which was used to buy 1500 shares of the total of 4500 he bought.

MR. DEVINE: We do not contend that the plaintiff is not the owner of 3000 shares, nor do we contend that he did not purchase 3000 shares.

The defense that we raised is that this was not disclosed. He attempted here to represent people who are not party to the case. His complaint was untrue and we feel that that makes him an improper plaintiff and that his whole complaint falls for that reason.

That is my motion to amend.

MR. LOEWINTHAN: If your Honor please, as your Honor stated the defense of laches doesn't apply since the statutory period -- he filed his complaint well within the statutory period.

In so far as the other parties are concerned

the testimony is that he was only a nominee and he certainly is, on the records of the corporation, the title holder of the stock, of the 4500 shares.

THE COURT: That isn't the question. The question is should I permit them to amend their answer.

MR. LOEWINTHAN: I think at this point it is a little late for them to amend the answer. There is nothing to establish any of the facts that they are requesting. I think if your Honor thinks they have proved on their case some of the things that they are asking for now, that at that time they may renew their motion.

THE COURT: Decision reserved.

What is your other motion?

MR. DEVINE: Your Honor, I might say that the motion I just made was on behalf of the defendant Lord. I don't know if the other defendants want to join in that or not. I would ask they speak for themselves.

MR. LIPSITZ: Defendant Phillips, Appel & Walden joins in that motion.

MR. COOPER: If your Honor please, defendant Burr would like to call the attention of the Court to the fact that those defenses are already interposed in his answer.

MR. GEIST: Your Honor, on behlaf of Elpac

Inc., I would like the answer of Elpac amended as per the motion.

THE COURT: If they are in Burr's answer, then they haven't just been learned since like yesterday and why haven't they been pleaded by the others?

What is the other motion?

MR. DEVINE: The other motion is a motion to dismiss for failure of the plaintiff to make a prima facie case. I will make this as brief as I can.

I know your Honor is aware as we all are of the elements of a 10B5 case, namely, there must be representations. The representations must be material to the purchase that is being alleged. There must be reliance. The reliance must be reasonable. There must be sienta, reason to know a falsity and there must be falsity proved in connection with the causation of damages.

I don't feel the plaintiff has proved anything near the requisite number of those elements, namely, all of them.

However, I want to focus on one in particular which I think alone is a sufficient basis on which to dismiss this case at this point and that is the failure to prove the falsity of any alleged representation.

If your Honor please --

THE COURT: Haven't they proved representation by the fact that the Steinberg's did not buy any of this security?

MR. DEVINE: I think they have proved that two people --

THE COURT: Just a moment. I think you would be well advised to have what I am about to say in mind.

Take a situation where a buyer of stock is interested through your client in a corporation on whom he stumbles by chance in Las Vegas. There comes a time when a group of people meet to discuss Mr. Burr's second, or whatever, certainly in this case second sale, having in mind the previous one in New York. That meeting is attended by your client and Mr. Burr who are talking about the sale of a given number of shares.

Your client is a member of the same firm as two of the people who say on that very day at that meeting, according to the witness if I believe him, that they are going to buy a substantial number of the shares of that offering.

Plaintiff sits there, hears your client attempt to offer, attempt to persuade two of his fellow RRs in the same company that this is a good and solid investment.

It seems to me a reasonable man might draw

an extra dimension of credability from the fact that along at the time that this was being offered to him, it was being offered by your client to two of his own RRs and it is not beyond the realm of possibility that in such circumstances, a person in the plaintiff's position might come to the conclusion, well, if it is good enough for them, it is good enough for me.

Isn't that a possibility? That goes through my mind and I really seriously invite you to discuss that.

MR. DEVINE: I think it is not only a possibility, it may in fact be what happened and it goes beyond that. I think this is exactly what happened, what this plaintiff was doing. He was relying upon Howard Mann having already purchased this security and having told him that he thought it was a good investment. He was relying upon the fact that Arnold Steinberg, Sr. would attend a meeting to consider whether or not to purchase himself.

He was relying upon the fact that Stuart Steinberg, Jr. attended that meeting to hear about the stock. That is what he was relying upon.

THE COURT: No, I think he said --

MR. DEVINE: That is why he purchased the stock.

THE COURT: I must determine the credability. He said he was relying upon the representations, 1, that they

were all going to buy it together and 2, the later representation that in fact they paid for it, if I remember what was testified to yesterday.

MR. DEVINE: Your Honor, this is not, as we see the evidence so far in this case, we don't feel they have made out their case.

THE COURT: Does anybody else wish to be heard?

MR. GEIST: I do, your Honor.

At this time I move to dismiss the complaint of plaintiff against defendant Elpac upon the grounds that plaintiff has failed to make out a prima facie case against defendant Elpac.

The evidence presented by plaintiff demonstrates that in no way did the defendant Elpac participate in any alleged fraud or misrepresentation. In fact, the evidence clearly shows that plaintiff was dealing exclusively with defendants Burr and Lord and that plaintiff looks solely to them for performance.

The defendant Elpac was not called upon by the plaintiff for information of any type, financial or otherwise. No documents were supplied to plaintiff by defendant Elpac. The fact that Burr happened to be an officer of Elpac should be given no weight whatsoever because in this

transaction, Burr was clearly acting independently for his own account and plaintiff knew it or should have known it.

The company derived no benefit from this transaction, not one scintilla of evidence --

THE COURT: The transaction based on the testimony of the last witness had at least in part the raising of money through the sale of stock for the repayment of corporate debt which had been personally endorsed by Mr. Burr.

MR. GEIST: Yes, Your Honour, but there is a distinction, I believe, between a statement which may or may not have been made as to proceeds and what has happened -- in other words, all the witness states is that there was some discussion about that and I am sure Your Honour would recognize the difference in any event that if Elpac were selling the stock as opposed to an officer that was selling the stock.

Not one scintilla of evidence has been presented by plaintiff against Elpac in support of his claim.

Rule 10B5 doesn't hover in the air like a net to gather in everything within site of view. I must reject the plaintiff's vacuum cleaner theory that he tries to sweep up in just because we happen to be the stock that was sold. He must certainly do more. He must show something of what

we did wrong. We did nothing wrong.

In his own testimony, the only person he ever dealt with at Elpac was Mr. Burr. He is not claimed to have received anything from Elpac, nothing in writing, nothing oral, nothing of any substance.

Therefore, it is my feeling that the complaint should be dismissed with respect to defendant Elpac.

THE COURT: What do you have to say about that?

MR. LOEWINTHAN: If your Honor please, first of all Elpac participated through its president.

THE COURT: Mr. Burr may have been its president, but Mr. Burr was selling Mr. Burr's stock.

MR. LOEWINTHAN: And Elpac received the benefits. The testimony was that it paid off Elpac's loan to the banks.

THE COURT: That is what it was going to be used for. I have no indication and there is no proof in the record as to what any of the money from the sale of the stock was used for. Mr. Steinberg said that is what Burr said he was going to do with it.

Presumably, if Burr wanted to, he could have gone to the race track. I invite you to tell me what corporate act or what act of Burr in his capacity as president

and or chairman, whatever he was, what act in the course of employment raises the responsibility of Elpac? Most everything I heard seems to me has to do with Burr and almost nothing has to do with the activities of his as the president of Elpac.

MR. LOEWINTHAN: Two things. First, the testimony was that Elpac was going to register the stock. To this date the stock has not been registered.

Number two, we have a telegram that is in evidence which specifically says, and I read from the telegram: "The above mentioned securities are to be registered on a best efforts registration as approved by the Board of Directors of Elpac in a meeting held Wednesday, August 7, 1968," and it is signed Robert L. Burr, Elpac, Inc. and this is in evidence, your Honor.

THE COURT: Decision reserved.

I will hear the next motion.

MR. LOEWINTHAN: In so far as --

THE COURT: I am going to deny Mr. Lord's motion and I am going to reserve decision on Elpac's.

MR. COOPER: If your Honor please, preliminarily may I be so bold to correct the statement your Honor made from the bench, to the effect this was the second sale of Mr. Burr's stock. The prior sale was Elpac's stock by Elpac.

THE COURT: It doesn't really make a lot of difference.

MR. COOPER: I want to join with Mr. Devine in his motion on behalf of defendant Burr, and I want to add to that the following; that there has been no proof of falsity of any representation allegedly made.

There has been no proof except Mr. Gordon saying that he thought that everybody was going to buy. He did not say that it had been represented to him that everybody was going to buy. He understood that everybody was going to buy and he relied, perhaps, on his expectation that they would buy.

Secondly, there is no proof of the fact that the claimed representation by Mr. Burr and Mr. Lord to the effect that the company was making a profit in the then current months of 1968, was false. There has been no proof of that.

Another ground is this: While superficially this complaint reads like a 10B5 complaint, it is actually couched in language which makes it a conspiracy complaint, so that regardless of the nature of the alleged intended acts, there must be proof that there was some concerted effort and aim on the part of the defendants involved to attain those ends.

There has been no such proof and absent that, there is no prima facie case on the part of the plaintiff in conspiracy.

I therefore move for a dismissal of the complaint with respect to the defendant Burr.

THE COURT: Decision reserved.

MR. COOPER: May I make another point.

If your Honor pleases, on the question of rescission, I believe the plaintiff is out of Court on the basis of laches.

THE COURT: I am not going to decide that now. As a matter of fact, after the defense is in, I am going to invite both sides to submit findings and conclusions. Neither of you have submitted any trial memorandum to me and I expect I will give you a reasonable time to submit whatever legal authority you think is binding here along with findings and conclusions.

You have made your motion. It is one of your defenses you tell me anyhow so of course it will be involved in my decision.

MR. COOPER: Also, sir, with respect to the question of an action for damages, it is my contention that the plaintiff has no right to bring an action for damages when he retains the stock and has made no effort to sell it.

THE COURT: I understand.

MR. LOEWINTHAN: May I make a statement in connection with Mr. Cooper's statement?

THE COURT: Yes.

MR. LOEWINTHAN: I think this has not been put into evidence, your Honor, but it was used at the cross-examination of Mr. Gordon.

I want to point out to the Court that the stock certificate specifically says that the sale or transfer of this security or receipt of any consideration therefore without the prior written consent of the Commissioner of Corporations of the State of California naming both transferor and transferee, is unlawful and punishable by fine or imprisonment or both.

I state unequivocably that Mr. Burr knew that when this stock was sold on August 22, 1968, he did not have the permission of the California Commissioner.

THE COURT: To do what?

MR. LOEWINTHAN: I prove that by this document that says it was issued on October 21, 1968, which I will offer in evidence.

MR. DEVINE: The plaintiff's case is closed, your Honor.

THE COURT: It is not all that technical,

really, in a non-jury case.

Show it to your adversaries.

MR. LOEWINTHAN: It came from them.

THE COURT: What is your position, gentlemen?

MR. COOPER: If your Honor pleases, there has been no testimony ther was representation that the certificate or consent had already been received.

THE COURT: He is offering the document. What is your position?

MR. COOPER: The complaint reads: "The defendant Burr would receive written permission from the California State Commission to consummate the said sale of stock.

There is no representation that he already had it, but we would be perfectly willing to permit this in evidence.

THE COURT: Any objection?

Hearing no objection, it is received.

xxxx (Plaintiff's Exhibit 7, received.)

MR. LIPSITZ: Your Honor, On behalf of Phillips, Appel & Walden, we make a motion for judgment dismissing the action against Phillips, Appel & Walden.

The only connection with Phillips, Appel & Walden in connection with this case, is that an employee

of Phillips, Appel & Walden which is engaged in the securities business, purported to represent Mr. Burr in the negotiation of a sale of private stock from Mr. Burr.

Mr. Gordon I believe testified that no one ever said to him, there was no information that anyone ever said that Mr. Lord was representing Phillips, Appel & Walden in connection with this transaction. We don't dispute Mr. Lord had an office at Phillips, Appel & Walden or that he was employed there.

I think the cases are quite clear that where an agent is not acting in connection with the sale from the brokerage firm, that it is unwarranted for the plaintiff to rely on any representations made by Mr. Lord.

Mr. Gordon did not have an account at the time at Phillips, Appel & Walden. His total connection with the firms as such involved a delivery of a certain number of shares into Phillips, Appel & Walden and delivery of those same shares out.

As far as the other elements of the case, we believe that it is quite clear that the plaintiff has not shown that other persons at that meeting did not purchase -- he had never met any of the people at the meeting before.

THE COURT: He has at least put a witness on the stand to say that the $80,000 worth of stock that the

Steinbergs were talking about buying was not bought.

MR. LIPSITZ: He doesn't know that the two gentlement in Philadelphia did not buy. They may have bought $100,000 worth of shares or a $1,000,000. He never bothered to check, never found out who they were.

Mr. Adlman, an employee of Phillips, Appel, could have bought as far as he knows $10,000,000 worth of shares of Elpac stock. He doesn't know that. All he cared about was that of the group there, some people said they were going to purchase and he hoped the money was going to be used forthe benefit of the company in some way which there is no proof that it was or was not.

There is no proof that the money was not raised as a result of that meeting, there is no proof that the money was not used as it was supposed to be used and the California Commissioner's certificate shows that there was in fact a sale, or at least, the Commissioner gave consent to the sale of 24,500 shares common stock, including the 4500 purchased in the name of Mr. Gordon.

I don't think that he can really say that he was relying on the fact that the Steinbergs particularly were purchasing. The group met for the first time and they gave an indication of their interest. I think he said everybody indicated they were interested in purchasing.

There was no commitment at that meeting and Mr. Gordon never after that time, he never contacted the lawyer, he never contacted Mr. Steinberg, he never contacted anybody. The only thing that he did, he got a telegram that said put up the money and he put up the money, $45,000.

He never called anyone at Phillips, Appel & Walden to find out if there were any research reports. He never made any investigation at all.

For him to come in and say he was relying on the fact that Mr. Steinberg was purchasing $80,000 worth of stock is unbelieveable.

THE COURT: That is for me to determine.

Your motion is denied.

Anybody else?

I think we will take ten minutes, then we will start the defense.

(Recess.)

MR. COOPER: If your Honor please, may I address the Court?

THE COURT: Yes.

MR. COPER: The defendant Burr rests his case and renews his motions.

THE COURT: Decision reserved.

MR. DEVINE: The defense case for Arnold Lord,

we would like to call Arnold Lord.

xxxxx ARNOLD LORD, a defendant, was called and being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY: MR. DEVINE:

Q Mr. Lord, what is your occupation?

A Currently, I am engaged as a real estate salesman.

Q What was your occupation prior to that?

A Prior to that, just prior to that I was an officer in a discoteque, part owner of a discoteque.

Q At any time, were you a stock broker, a registered representative?

A Yes.

THE COURT: What was the name of the discoteque?

THE WITNESS: The Sanctuary.

Q When did you become a stockholder?

A Sometime in 1960.

Q Between 1960 and 1968 were you continuously employed as a stockbroker?

A No.

Q What else did you do during that period?

A From 1961 to 1963 I was in the United States Army.

Q were you honorably discharged?

A Yes.

Q By whom were you employed during 1968?

A By Phillips, Appel & Walden.

Q When did you begin your employment with Phillips, Appel & Walden?

A Sometime in 1965. The exact month, I don't remember.

Q Very briefly forthe Court, would you tell us what your duties as a registered representative at Phillips, Appel & Walden during 1968 were?

A Simply to buy and sell securities for clients.

Q Where where your offices located during 1968?

A 469 Seventh Avenue.

Q Was that throughout all of 1968?

A Yes.

Q Did there come a time when your employment with Phillips, Appel & Walden terminated?

A Yes.

Q When was that?

A Toward the end of 1968. I am not sure of the month, November, October, something like that.

Q What was the reason for the termination of your employment?

A I wanted to try something on my own and I was bored with the brokerage business and I just wanted to leave. I

I just left.

Q After you left the employment of Phillips, Appel & Walden, did you maintain an office anywhere?

A No, but I did work out of an office at 221 West 57th Street.

Q When did you begin working out of that office?

THE COURT: What was that address?

THE WITNESS: 221 West 57th Street. That was the office of an attorney by the name of Hofer.

Q Did you receive telephone calls at that office?

A Surely.

Q After you left the employment of Phillips, Appel & Walden, did you continue to share a desk or an office with George James?

A After I left?

Q After you left their employ?

A No, I had no reason to. I left their business.

Q Did you receive phone calls at George James desk?

A I might have from people who didn't no that I had left. That is possible.

Q Did you ever actually accept a phone call, have a conversation on the telephone after you left the employment of Phillips, Appel & Walden at George James' desk?

A I don't remember ever receiving a phone call or

being there when somebody called me. It would have to be a tremendous coincidence.

Q Specifically, in March of 1969, did you receive a phone call from Mr. Gordon at Phillips, Appel & Walden while you were at Phillips, Appel & Walden?

A That is highly unlikely.

Q Do you recall receiving any phone calls from Mr. Gordon after you left Phillips, Appel & Walden while you were physically at Phillips, Appel & Walden?

A No, not at all.

Q What colleges have you attended, Mr. Lord?

A I went to Brooklyn College and City College of New York.

Q Have you obtained any degrees?

A Yes. I have a B.S. degree.

Q From what college?

A Brooklyn College.

Q In what academic area did you concentrate at Brooklyn College?

A I got a B.S. degree in accounting.

Q Have you ever heard of a company named Elpac?

A Yes.

Q When did you first hear of it?

A In 1967, sometime, probably toward the latter part

of the year.

Q How did you come to hear of it?

A It came to my attention through the Value Line Mutual Fund. some analyst at Value Line Mutual Fund. They had an interest in the company and I used to keep in contact with Mutual funds and their analysts on specialty growth companies and speculative companies with new kinds of technologies. That is what I was interested in.

Q What did you learn about Elpac from the Value Line people when you first heard it?

A Basically, that they had invested in the company and that they felt positive about the potentials for the company and I guess just some basic information about some of the products. Enough to entice me to look into it further.

Q How did you look into it further?

A Well, I called the company and spoke to management and eventually went out there.

Q Where did you go?

A I went to visit Elpac in Newport Beach.

Q When did you make that trip?

A The first time?

Q Yes.

A That was at the end of 1967.

Q When did you first meet Robert Burr, a defendant in this case?

A The first time I went to Elpac at the end of 1967, but I had spoken to him on the phone before this.

Q What was his position at Elpac when you first met him in California?

A I believe he was president and chairman of the board at the time.

Q Subsequently, did you have occasion to speak to Mr. Burr again?

A Oh, yes, several times, getting information, finding out who the man to speak to was to substantiate different things and different products and who their clients were. Mostly getting information.

Q In May or June of 1968, did you visit Elpac's facility in Newport Beach with Mr. Mann, Howar Mann?

A Yes, I did. I don't know exactly what date, but we went out there together.

Q What did you and Mr. Mann do while you were at Elpac's facility in California?

A Well, Howie wanted to see what was going on there and learn all about the company, a very investigative type of person.

Q Do you know why he was interested?

A Yes. He was investing in a private placement that took place that spring of 1968.

THE COURT: He had already invested?

THE WITNESS: That is very possible.

THE COURT: I am asking you.

THE WITNESS: I don't remember exactly the coordination of it. It is too long ago for me, but it was around the same time.

Q What did you and Mr. Mann do while you were at the plant or at the facility of Elpac in California?

A We spoke with Bob Burr and the other officers, the financial officer, the marketing officer and the chief engineer and we got a tour of the plant and we specifically spent a lot of time in one area which was their controls division, to see the future potential.

The future potential of the company was based upon a couple of key products and one of them was a machine that was a high speed drilling machine which was called a 20-20. It was a new revolutionary kind of item. The state of the art of high speed drilling of printed circuit boards, and there was a great market for this kind of thing and Howie specifically was ver interested because he is a very mechanical type of guy and he wanted to know how the thing worked so we spent a awful lot of time

with the engineers and the marketing people were planning to sell it based upon the engineers.

Q Did you talk to financial people of Elpac while you were there?

A Oh, yes.

Q Was Mr. Mann present?

A Yes. He probable asked more questions than I did.

Q Did there come a time in 1968, whether it be before or after the visit to California that you have been testifying about, did there come a time when Elpac effected a private placement of its common stock?

A Yes.

Q As well as you can recall, when did that private placemant take place?

A Well, I think it was in May, sometime, in 1968. I don't remember the exact date. It was I think, for about a million and a half dollars.

Q Did you personally participate in that private placement in any way?

A Well, yes. I advised certain customers of mine, friends of mine, to invest in the company based upon what I believe would happen with the company and also at the same time my participation was a small end in terms of the total placement.

Most of it was taken down by mutual funds at that time and institutions and a lot of the information that I had gotten came from institutions and mutual funds like Value Line, and also from the partners of Loeb, Rhoades and Company who invested at the time and excited about the company.

Q Who were the people that you introduced to Elpac in connection with that private placement?

A The first placement?

Howie Mann was one. Even though Howie wasn't a customer of mine, we were friendly at the time and he became interested in the company due to me.

Another good friend of mine, a guy by the name of Donald Fainberg. A man by the name of Henry Feldman and the other names, I don't remember. There were a few.

Q Do you recall approximately how much each of those people invested and at what price per share in that private placement?

A Well, the price per share was ten dollars per share and Howie Mann put in $50,000 which would mean he would buy 5000 shares. Donald Fainberg put in $50,000. I believe Henry Feldman put in $250,000.

Q Prior to that placement, was a meeting held with respect to the proposed placement?

A Yes. Because I was a broker at Phillips, Appel & Walden, we had to do this through Phillips, Appel & Walden, so Phillips, Appel & Walden held what they call a due diligence meeting to explain the risks involved to the people and I guess to just substantiate that they are aware of all the facts and that was held at around that time at the offices of Phillips, Appel at 469 7th Avenue.

Q Who was present at that meeting, at that due diligence meeting?

A I was, Jimmy Walden who was a partner of Phillips, Appel; Jerry Kern who was their attorney; Bobby Burr; Dennis Kreiger who was on the board of directors of Elpac at the time; Howie Mann was; Henry Feldman; Donald Fainberg and there must have been more but I can't remember who else was there. Those I know were there.

Q Was the financial condition of Elpac at the time discussed at that due diligence meeting?

A I believe so, yes.

Q Were financial statements for the company handed out to the people present at that meeting?

A They had to be. All that was part of the private placement that was necessary.

Q Your answer is that financial statements were handed out, is that correct?

A Yes.

Q Did the purchasers in this private placement obtain any guarantee to have their stock registered by Elpac?

A No. That would have been impossible, and let me explain what I mean by that.

They signed investment letters which meant that they would hold the stock for a period of reasonable investment and in those cases it was considered by the attorneys, at least that explained it to me, to be a period of at least two years and what would happen at the end of that two years, I think a percentage of those people could ask for registration and the company was obligated to try and register it, that is all they would do, but at the time the California Commissioner, I remember, I was explained they were very difficult in giving out registrations on this stuff, so the only thing that could occur, after a long period of time these people could request it and the people would have to do whatever they could to try and do it and that is the way a private placement was held, on that basis.

Q Is that the situation which pertained to the stock that Howard Mann bought in that placement?

A Oh, yes, sure.

Q Do you know how much Elpac raised in that private placement?

A I think it was around a million and a half dollars, but I am not sure exactly.

Q Do you know what use was made of the proceeds?

A Well, a good deal of it was to pay off certain obligations and some of it was for working capital. The company was in 1968 constantly in trouble for not having enough working capital and this was the main problem with the company.

Q Did you receive any compensation for your services in connection with that private placement?

A No. It wasn't possible, because I came in on the deal too late to get any kind of commission from it, so at Phillips, Appel, the only thing we got was the right of first refusal on any further deal that would be done with Elpac, which I thought there would be.

For example, there were plans to have one of the divisions that they felt would be a very blossoming aspect of the company be a spin off sometime in the future to go public and if so, Phillips, Appel would have handled it and at that time I would have gotten whatever it was that would have been compensation for that.

Q Did Irving Gordon, the plaintiff in this case, purchase any Elpac stock in that private placement?

A No.

Q Subsequent to that private placement, did you keep yourself informed about Elpac?

A Absolutely. I was involved in other things with the company.

Q How did you keep yourself informed?

A I certainly made a lot of visits to the company, plus the fact later on in that year I participated in helping the company go through with a merger in which I particularly raised through clients approximately a million dollars in that merger.

Q Let's pause at that point and describe for the Court exactly what this second transaction regarding Elpac was and start by telling the Court when it took place?

A Exactly, it was in the fall sometime of 1968. The exact date, I don't know, but I am sure there is a record of it.

Q What kind of transaction was it?

A It was a peculiar kind of thing. At the time the difficulty [redacted] was working capital. We were trying to get money into Elpac. At the time for some reason, the California Commissioner would not allow another private placement for the company. They had completed one in May and it needed some additional capital, so we sat down with lawyers and worked out at the time what I can recall

was a simultaneous transaction and what I mean by that is, I had investors including mutual funds invest in a company in Atlanta, Georgia called Aero Science & Electronics.

At the closing of the money going in and that deal being completed, it was simultaneously merged into Elpac so the original investors would end up with Elpac stock for their investment and this is what the merger was all about.

Q Did this produce money for Elpac?

A It produced around a million dollars, plus the fact it produced the other company which really worked in very well in terms of its product line with Elpac and it was a savings because ther was no longer a need for warehousing and also it was an introduction to IBM, so to speak, because this company was dealing with IBM and getting a great deal of their business from IBM.

It was a good thing overall for Elpac.

Q Do you know what use Elpac made of the proceeds?

A Well, like I said before, most of it was used for working capital and some of it to pay off obligations that the company had at that particular point. Exactly, I don't know.

Q The investors in this transaction in the fall received Elpac stock, is that correct?

A Well, I believe they did because that is the only

certificate I think they received because Aero Science then became Elpac at the same time they put their money in.

Q Do you recall as it all worked out how much each investor paid for the Elpac stock he was winding up with in that transaction in the fall?

A They paid, I think it was $10 a share, or just around $10 a share.

Q Did you introduce investors to that transaction?

A Yes, I did.

Q Who did you introduce?

A There was my wife's uncle who bought some; Donald Fainberg again who was a friend of mine. I believe the Hemisphere Mutual Fund. It might by Sy Management. I am not sure whether they came in on that first deal. A bunch of people that were client friends of mine; a relative or so.

Q Did you receive any compensation for your services in connection with this Aero Science transaction?

A Yes, I did.

Q How much did you receive?

A Actually I got reimbursed from Phillips, Appel because they received the original commission and I believe that I received 75 per cent of my end of the commission and it was something like, I think the commission was something

like $10,000 in cash and a bunch of stock and I think the stock I received worked out to something over 4000 shares of Elpac, eventually. Something like that.

Q At the time of this Aero Science transaction in the fall of 1968, did you believe that Elpac was a good investment?

A Oh, yes. I put my people into it and my friends; of course.

Q What kind of investment did you believe it was at that time?

A What it was, it was a speculative company, a growth company in high technology that was going from bad news to hopefully work out based upon its products which were in high technology, which presupposes speculation kind of growth.

Q What kind of a future did you see for Elpac in the fall of 1968?

A I thought it would be great. Our expectations, of course, and if you want to go into lengthy explanation of what I believed in the company was that the company would turn the corner by the end of 1968. We felt that 1969 would be a profitable year. 1970 would be the big year.

This is the reason why I got involved in long term stock with the people on unregistered securities

rather than by that amount for people in the market place, because it was a future kind of item and the big products were this drilling machine, which was a high speed printed circuit board drilling machine and at the time it drilled something like ten times faster than any other machine and it was very worthwhile, even for small companies to own even though it was an expensive machine.

Then there was the area of data terminals and at that particular time, one of the news items in the United States in terms of future markets for new technology was in data communications which is the transmitting of data from computers into computers and receiving information through communication systems and one of the big items that Elpac had come up with then, one of their engineers, was a data terminal.

Now, at the time we were -- I am saying "we", Elpac was negotiating with IBM Service Bureau for a very large contract for that data terminal and they needed an enormous amount of those terminals which would be many, many millions of dollars and the terminal stacked up both pricewise and performance wise to anything that existed at that particular time.

Now, let me explain why I BM would buy a terminal from some other company.

Q I don't think you need to unless the Court would like to hear it.

THE COURT: No.

Q I think you have given us a sufficient answer.

A I am sorry.

Q Between the May 1968 private placement and the Aero Science transaction in the fall, did you meet Irving Gordon the plaintiff in this case?

A Yes.

Q When did you first meet him face to face?

A I am not positive of that, but my recollection is that the first time that I spoke to Mr. Gordon was on the phone and let me give you the background for that.

Q Before you do that, let me ask you, is it possible that you had met Mr. Gordon for the first time in Las Vegas?

A A That is possible but I don't remember it.

Q Tell the Court the first time you remember talking to Mr. Gordon?

A Well, Howie Mann who participated in the first private placement came to me around that time and told me he had to go to his CPA to work out where he was getting his $50,000 from to put into the first private placement that he invested in and he came and told me that his CPA who is Mr. Gordon, and he called him a greedy kind of guy

and when he heard of Howie's investment, Howie had been very successful in the stock market and made most of his money at that time, he was a kind of wealthy boy --

Q Was Howard Mann a client of yours?

A No, he was a client of somebody else at Phillips, Appel & Walden.

Q You were acquainted with him?

A Yes. We had met in Bermuda. I had gone down to Bermuda with my wife and we met down there. We socialized but we never did any business.

Howie told me --

MR. LOEWINTHAN: Objection as to what Mr. Mann told him.

THE COURT: Sustained.

Q Tell us what you recall of your first conversation with Mr. Gordon and when it took place?

A Howie told me. --

MR. LOEWINTHAN: Objection.

THE COURT: Sustained.

Q Start with Mr. Gordon.

A Mr. Gordon and I first discussed -- he wanted a piece of the stock or what he termed a piece of the action of what Howie got. At the time that Mr. Gordon's name was given to me from Howie Mann, I don't know whether

I called him on Howie's urging or whether he called me at that time or what happened.

Q What was said in that conversation as well as you can recall?

A Specifically I told him that the deal was closed and that the allocation for the private placement was closed and he couldn't be part of that deal and that was pretty much the end of it and he said he wanted to get the same kind of deal that Howie got.

Q Was this before or after your trip to California with Mr. Mann?

A I don't know, really. It may have been before.

Q In that first conversation with Mr. Gordon, did he express a desire to purchase Elpac stock?

A Oh, yes, sure. That was the reason for the conversation, because he wanted it.

Q Did he tell you whether he wanted to buy market stock or privately sold restricted stock?

A He wanted to have the same deal that Howie Mann got which was restricted stock at a substantial discount to the market price at the time.

Q Did he tell you why he wanted to purchase Elpac stock?

A No, but I assumed he was excited because --

MR. LOEWINTHAN: Objection.

THE COURT: Don't tell us what you assume.

Sustained.

Q At that time, did you tell him that there might be some stock available for purchase on a private basis?

A The first time?

Q Yes.

A No.

Q When did you tell him that, if you ever did?

A Well, after that some time, Bob Burr had to sell his securities and Burr told me about this and even Howie was aware of that. Howie was in contact with Bob Burr like I was. We were all kind of friendly at the time and at that time when Burr's stock came up, either Howie came to me and said I should call --

MR. LOEWINTHAN: Objection as to what Howie said to him.

THE COURT: Yes. Sustained.

Q Try and leave out conversations which were between yourself and Howard Mann.

A Okay.

Would you repeat the question, I got lost.

Q You were telling us how you came --

THE COURT: You said that Burr told you he

had to sell some stock.

THE WITNESS: Right.

THE COURT: Pick it up from there.

A (Continuing) And the question is what?

Q I want to know when you explained to Mr. Gordon that there might be stock for him to purchase.

A There was a telephone call I either made to Mr. Gordon or Mr. Gordon made to me on Howie's urging -- I don't remember the exact circumstances, but Mr. Gordon wanted it prior to that so when Mr. Burr's stock became available or he had to sell his securities, that is when I spoke to Mr. Gordon.

Q Subsequently, did you attend a meeting in the offices of Stuart Steinberg's father?

A Yes, I did.

THE COURT: When was that meeting?

THE WITNESS: The exact date I have no idea.

THE COURT: What is the month and year?

THE WITNESS: I assume June, July but I don't remember exactly.

Q At that meeting or in the hall immediately outside Mr. Steinberg's personal office, did you state to anyone that Elpac would make a profit in July of 1968?

A No. I doubt that tremendously.

Q Did you state that Elpac would make a profit in any subsequent month of 1968?

A No. You see, we didn't feel -- we weren't talking about current profits. The basis on which everybody bought that stock the basis which I believed in it and the mutual funds and every professional involved in that company, was that they would turn around in that year and in 1969 they would become profitable and in 1970, they would become profitable and the company would show this big turn-a-round.

It was a long term thing. That is why all the professionals invested on a long term basis. That is why I bought it and advised people to invest in it on a long term basis.

The current year, everybody knew --

THE COURT: Strike it out.

Put a question.

Q In July of 1968, at about that time, did Mr. Gordon sign certain documents in your presence with respect to Elpac?

A I believe he did, yes.

Q At the time he signed those documents, did you state to him that the company would make a profit in July of 1968 or in any subsequent month of 1968?

A No.

Q In August of 1968 when Mr. Gordon was paying for the Elpac stock that he was going to purchase, or was purchasing, did you tell Mr. Gordon that the people at the June meeting had all purchased and paid for their stock?

A No, absolutely not. I couldn't have.

MR. LOEWINTHAN: Objection to the last part.

THE COURT: Strike it out.

Q Did you ever at any time state to the plaintiff, Irving Gordon, that everyone at the June 1968 meeting had paid for their stock; did you ever tell him that?

A No. Those people worked with me, right next to my office, how could I say something like that.

MR. LOEWINTHAN: Objection.

THE COURT: Strike it out, everything after the word "No.".

Q Did you ever tell him that Stuart Steinberg and his father had paid for the stock?

A Absolutely not.

Q Did you tell Mr. Gordon at any time that the 20,000 share block had in fact been purchased, and I am referring to the 20,000 share block that Mr. Burr owned?

A That is possible, because it was.

Q Who had purchased it?

A Diebold Mutual Fund. I think it was called

Diebold Venture Capital Fund.

Q Does the name Diebold Technology Venture Fund refresh your recollection?

A Yes, that is it.

Q How many shares of Mr. Burr's stock did they purchase?

A 20,000 shares, I believe.

Q Whod did they purchase it from?

A From Mr. Burr.

Q How much did they pay per share?

A I believe they paid $12 per share.

Q Who ran the Diebold Technology Venture Fund in the latter part of 1968?

A A guy by the name of Frank Smith.

Q At that time, in the latter half of 1968, did you consider the Diebold Fund and Mr. Smith to be sophisticated investors?

A Absolutely. At was a good fund and Mr. Smith himself had a very good reputation.

MR. LOEWINTHAN: Objection.

THE COURT: Object before he finishes answering.

Strike it out. Motion granted.

Q Do you know how much total Diebold Fund paid for

the stock that they purchased from Mr. Burr?

A I am just about positive it was $240,000.

Q Did you ever at any time tell the plaintiff Irving Gordon that Elpac would make a profit in July of 1968, yes or no?

A No.

Q Did you ever tell him that they would make a profit in any month in 1968?

A No.

Q Did you ever tell him that in fact Elpac had made a profit in any month of 1968?

A No, absolutely not.

Q With respect to Mr. Gordon's purchase of Mr. Burr's stock, did you receive any compensation from Mr. Gordon?

A No.

Q Did you receive any compensation from Mr. Burr?

A No.

Q Did you receive any compensation from Elpac?

A No.

Q Did you receive any compensation from anyone in connection with that purchase?

A No, absolutely not.

Q Were you ever paid a salary by Elpac?

A No.

Q Did you ever enter any contract with Elpac under which you obtained any compensation for advisory services or consulting services of any kind?

A No, just whatever deals I did I got commissions for, like Aero Science.

Q Were there any other deals for which you got commissions other than Aero Science?

A No.

THE COURT: Did you get any commission on the $240,000 that represented the 20,000 shares sold to Diebold?

THE WITNESS: No, I had nothing to do with that, somebody else did.

Q Did you profit in any way from the plaintiff's purchase of Mr. Burr's Elpac stock?

A Did I profit?

Q Did you personally profit?

A No.

Q Did you ever get any fees from Elpac at any time for services of any kind?

A Fees?

Q Fees, payments, anything?

A After the reorganization, they reimbursed me for certain expenses I had in connection with trying to do certain mergers forthem.

There was one merger we were trying to do --

MR. LOEWINTHAN: Your Honor, can we fix a date?

THE COURT: Yes.

Q When were these expenses reimbured to you?

A Recently. I would say '71, 1971 or maybe 1972.

Q How much was the total that you were reimbursed?

A I think it worked out to about a thousand shares of stock at the time because they reimbursed the creditors with stock and I think it was something like $1200 in total.

THE COURT: $1,200 in cash?

THE WITNESS: No. They gave me stock I sold and I think it was a dollar a share. It was something like $1,200 that I got out of it.

THE COURT: Was this after the reverse split?

THE WITNESS: Yes.

Q Had you expended as much as you were reimbursed or more in pursuing business for Elpac?

A Much more.

Q You realized no profit from that reimbursment, is that correct?

A No. I lost a lot of money.

Q At some point, did you become a director of Elpac?

A Yes, I did.

Q When was that?

A Exactly, no.

Q Approximately?

A I would say the second half of 1968, probably around September, something like that, if I had to guess at a month.

Q Did you receive any directors' fees from Elpac?

A No.

Q Who paid your expenses to go to California for meetings?

A I paid.

Q Did you receive any pension or fringe benefits of any kind from Elpac while you were a director?

A No.

Q Mr. Lord, I would like to do one other thing before we finish with your examination. I want to read you the representations which the plaintiff claims that you made in paragraph nine of his complaint and I want you to answer as to each representation I read to you whether you ever made such a representation; do you understand?

A Whether I said those things?

Q Yes.

Reading from paragraph nine A of the complaint; that the arrangement for the sale of 20,000 shares of

defendant Elpac stock owned by the defendant Burr and offer to the original group of persons present at the meeting of June 1968 as set forth in paragraph 8 above of which the plaintiff was one such person, had been consummated.

A To those people?

Q Did you ever tell Mr. Gordon that that had been sonsummated?

A No.

Q Paragraph 9B; that each of the said persons at the said meeting of June 1968 referred to above, had accepted the arrangement and had purchased allotted shares of the defendant Elpac stock from the defendant Burr and each person was forwarding his check for the same.

Did you ever tell Mr. Gordon that?

A Never said anything like that.

Q Paragraph 9C; that the stock would be registered no later than April 30 , 1969?

A No, that is impossible.

MR. LOEWINTHAN: Objection, your Honor, to "Impossible".

THE COURT: Strike it out.

Q Did you make that representation?

THE COURT: He said "No".

A No.

Q Paragraph 9D; the defendant Burr would receive written permission from the defendant Elpac to consummate the sale of his shares of stock in the defendant Elpac to the plaintiff.

Did you ever make that representation?

A No.

Q Paragraph 9E; the defendant Burr would receive written permission from the California State Commission to consummate the said sale of stock.

Did you ever make that representation?

A No. These things were none of my business.

MR. LOEWINTHAN: Objection, your Honor.

THE COURT Strike it out.

Stop these asides you tack on to each one of your answers. Just answer the question.

Q Paragraph 9F; the defendant Burr would receive written permission from any banks or others to which the Defendant Elpac was indebted to consummate the said sale of stock.

A No.

Q Paragraph 9G; the defendant Burr would deliver to the plaintiff and other purchasers of any of his stock a written guarantee as to when the stock would be registered.

A No.

Q Paragraph 9H; the defendant Burr would lend the funds received fromthe plaintiff and others for the sale of his stock to defendant Elpac for the sole purpose of causing defendant Elpac to pay the corporate note or notes held by creditor banks which said note or notes had been personally guaranteed by the defendant Burr.

A No.

Q Lastly, 9I, the defendant Elpac was at the time of the offer to sell the aforesaid stock operating at a profit and that defendant Elpac had enough current orders to produce a big profit for the year 1969.

A 1969?

Q 1969.

A No.

Q Is it possible that you said a big profit would be produced in 1969?

A In 1969 it is possible that I thought there would be a profit but I didn't state that there were big orders because there weren't any. We were hoping to get big orders.

Q One last thing, Mr. Lord.

You testified you did not make any of these representations. Did Mr. Burr ask you to make any of these representations?

A Not at all.

MR. DEVINE: That is all I have.

THE COURT: Do you know whether Phillips, Appel got any payment on account of the Irving Gordon transaction?

THE WITNESS: They didn't. They didn't even know it occurred.

THE COURT: You may inquire.

xxxxx CROSS EXAMINATION
BY: MR. LOEWINTHAN:

Q In 1968 you testified you were a registered representative?

A Yes.

Q When did you discontinue being a registered representative?

A Near the end of 1968. I am not sure whether it was October, November. Just around that period of time.

Q Did you lose your representation?

A Not by any means. I left voluntarily. I never had a problem.

Q At the meeting of June 1968, you just testified that you made none of the representations included in plaintiff's complaint.

A What meeting?

Q The meeting of June 1968 when all of the persons who were going to purchase stock were present at Steinberg

& Pokoik's office?

A Right.

Q What did you say?

A I don't remember what I said, if I said anything at all, but I know what I could have said and couldn't have said.

Q Are you telling us that you stood mute at that meeting?

A No, I am not saying that.

Q And you can't remember anything you said to Mr. Gordon or to the other persons present?

A If anything, I described --

Q I am asking you whether you remember. I don't want you to conjecture.

A Exactly, no.

Q Not exactly, the substance of what you said.

A Yes. I can only assume.

THE COURT: Don't assume. We just want to know what your recollection is.

A I can't recollect exactly what I said.

Q Weren't you interested in having these people purchase Mr. Burr's stock?

A Those people --

Q I asked you a question and the answer could be

yes or no, Mr. Lord.

MR. DEVINE: Could be, but it may not be.

THE COURT: It may be, let's try it out and see if it works.

THE WITNESS: Repeat the question.

THE COURT: Read it, please.

(The question was read.)

A I would like to have seen it, yes.

Q And you don't recall what you said in connection with having these people purchase the stock?

Are you telling that to this Court?

A That is right.

Q You do not remember that. You remember who was present?

A Some of the people, yes.

Q Who do you remember was present?

A I remember Mr. Steinberg, because it was his office. I remember Stuie Steinberg because I worked with Stuie and Stevie Green, because Stuie and Stevie Greenberg set up that meeting and they were Stevie Greenberg's people.

Q Did Mr. Gordon know him?

A Mr. Gordon got there through me but the other people got there through Stevie Greenberg.

Q The two of them from Philadelphia?

A Them I don't remember. The only people I remember was myself, Mr. Burr, Mr. Gordon, Stuie -- I don't even remember Stevie Greenberg being there and Stevie was and he is a friend of mine and I don't remember him being there. My recollection of that meeting is pretty poor.

Q You know that Mr. Gordon bought 4500 shares of stock, of Mr. Burr's stock in Elpac; you know that, don't you?

A Yes.

Q Did you ever receive any remuneration for that deal at all?

A Nothing at all.

Q Did you ever receive any payment at all from Elpac?

A Nothing.

Q Did you ever receive any payment f rom Mr. Burr?

A Nothing.

Q Did you ever receive any payment from Elpac for any other deal?

A Yes.

Q What is that?

A That was the Aero Science Electronics merger.

Q You testified to that.

A Yes.

Q Did you ever receive any remuneration from Mr. Burr for any other deal?

A For any other deal?

Q For any reason?

A In connection with Elpac; no.

Q In connection with anybody.

A I doubt it very much.

THE COURT: Don't you know whether or not you ever got any compensation from Mr. Burr?

THE WITNESS: As compensation, no.

THE COURT: Let's not play with words.

Did you ever get any money from Mr. Burr?

THE WITNESS: No.

THE COURT: Or anything of value?

THE WITNESS: Nothing.

Q Did you ever receive any notes from Mr. Burr?

A Notes? No, absolutely not.

Q So it is your testimony, and I will ask you once more, and remember, I suppose you do know, you are under oath; did you ever receive any monies other than that one deal that you talked about from Elpac?

A To the best of my knowledge, no.

Q Did you ever receive any monies of any kind from Mr. Burr?

A That I don't know because we were in the habit of loaning each other money, paying for each other's plane trips, stuff like that.

Q Would that be in the nature of a hundred dollars, two hundred dollars?

A It wouldn't be an enormous amount.

THE COURT: What was the amount, instead of fiddling around, let's find out what was the largest amount that you may have borrowed from Mr. Burr at any one time.

THE WITNESS: It would be in the hundreds of dollars.

THE COURT: Under a thousand?

THE WITNESS: I would imagine so.

Q If it was over a thousand, you would certainly remember it, wouldn't you?

A Yes.

Q I show you an advice to depositor from Manufacturers Hanover Trust Company from Robert L. Burr to A.A. Lord.

Is that you?

A That is right.

Q It is in the amount of $3,667.

I show this to you and ask you if you received that from Mr. Burr?

It is easy to answer --

THE COURT: Let him look at it.

A It looks like it from here, but I don't remember it.

MR. LOEWINTHAN: I offer this advice to deposi-
tor in evidence -- for identification.

xxxxxx (Plaintiff's Exhibit 8, marked for identifi-
cation.)

THE COURT: I hear no objection, it is received.

(Plaintiff's Exhibit 8, received.)

xxxx THE COURT: Do you want to look at that?

THE WITNESS: Yes.

THE COURT: Does that refresh your recollect-
ion, having looked at it again?

THE WITNESS: Yes, I think it does.

THE COURT: Tell us what it refers to?

THE WITNESS: Okay.

In November of 1968 I was helping to organize a company called Advance Memory Systems and at the time Bob Burr and I were close after working on Elpac, and Bob wanted to buy some of the initial stock of Advance Memory Systems along with me and I believe if anything, that check is for that payment, and that is what I think it is for. I don't think it had anything to do with

Elpac or any fees.

Q I didn't ask you about Elpac. I asked you whether you had received any payment at any time from Mr. Burr for anything or for any reason whatsoever and you testified, no.

A That is right. At the time I didn't remember.

Q If this was for stock, doesn't it strike you that $3,667 is an odd figure? Isn't that approximately one-third of $11,000?

A That is right.

Q Did you receive another $3,667?

A What do you mean?

Q I mean exactly what I said. Was the deal for $11,000 or for $3,667 and did you receive two other payments?

A I believe I paid about $11,000 for Advance Memory stock.

Q How much was the stock selling for at the time?

A It was being organized and it was at approximately -- at the time I think it was 20 cents a share or thirteen and a half cents a share, it was in the pennies.

Q Is it your testimony that Mr. Burr gave you $11,000?

A No.

Q If you paid $11,000 for the stock, where did you get the money?

A It was my own money.

Q But this is $3,667 that Mr. Burr gave you and you just testified you were buying the stock for Mr. Burr?

A No, I didn't testify to that. I said that Mr. Burr was supposed to participate to one-third of the extent, or one-fourth of the extend, I am not sure exactly, of my participation in Advance Memory Systems and in effect he never did, but that is what that was for.

THE COURT: What do you mean he never did? Did you deliver to him one-third of the stock?

THE WITNESS: No.

THE COURT: Did you return the $3,667?

THE WITNESS: I don't know.

Q Let's get to the meeting of July 18 at Phillips, Appel & Walden; do you remember that?

A The July meeting --

THE COURT: Before we leave this. Did you ever have any other financial transactions with Mr. Burr of any kind?

THE WITNESS: Not that I know of.

THE COURT: Go ahead.

Q Let's go to the meeting on July 18, 1968, the meeting after June in Mr. Pekoik's office.

Just prior to that meeting, did you call Mr. Gordon and ask him to come to your office?

A I don't know, maybe.

Q Is it a fact that Mr. Gordon was in your office on July 18?

A I can't remember July 18 any more than any other day.

Q I will refresh your recollection.

I show you plaintiff's exhibit 1 and I ask you to look at the last page -- this is a copy -- and I ask you to look at the last page where Mr. Klein notarized the signature of Mr. Gordon and tell us the date?

A July 18.

Q Does that refresh your recollection that he was in your office on July 18?

A He must have been.

Q Who is Mr. Klein?

A Larry Klein works in our office and he was a Notary Public.

Q He notarized the signature, so he was there on the 18th, is that correct?

A Obviously, yes.

Q How is it that Mr. Gordon walked into the office on July 18?

Didn't you call him and tell him there were some papers for him to sign?

A I guess so, I don't know. I don't remember whether he just showed up and the papers were there or I called him and said the papers were there.

Q Let me ask you whether you remember if he signed it. Do you remember him signing it?

A Yes, I do, vaguely.

Q Do you remember that you filled in the first, all of the blank spaces on Plaintiff's exhibit 1?

A I don't remember that. It could very well be.

Q Is this your handwriting?

A Yes, it certainly looks like it.

Q Then you did fill it in. Did you fill it in before or after he signed it?

A I undoubtedly filled it in with him there asking him the questions.

THE COURT: Do you remember?

THE WITNESS: Yes, I do. He sat right on my right.

Q You remember he sat right on your right but you don't remember the date and you don't remember practically anything else about this meeting?

A The only thing I don't remember is the date and exactly when it occurred.

Q But you did fill this in, is that right?

A Yes.

Q Did you take it out of your drawer before ti was filled in?

A It was probably on my desk.

Q If it was on your desk, was it in blank?

A Absolutely.

Q Did you fill it in before Mr. Gordon signed it or after he signed it?

A While he was there.

Q I didn't ask you that. I asked you whether you filled it in before he signed it or after he signed it.

A Before he signed it.

Q I show you plaintiff's exhibit 2 --

THE COURT: Let me see exhibit 1, but you go right ahead.

Q I show you plaintiff's exhibit 2 and I ask you whether you filled that in before Mr. Gordon signed it?

A That I have no idea. The 4500 does not look like my writing. March 31 could be my writing. I really can't tell you.

Q This was executed at the same time that plaintiff's exhibit 1 was executed; isn't that so?

A That is so.

Q Although it is not dated, you recall it was

executed at the same time; is that right?

A If it is not dated, I don't know.

Q Could it have been executed after that date?

A It could have been executed any time, I don't know.

Q Do you recall it?

A I recall the document, yes.

Q Did you send that document through the mails to California?

A I have no idea.

Q How did Mr. Burr get it? It is addressed to Mr. Burr, is it not?

A It sure is.

Q How did he get it?

A I don't know how he got it.

Q You had it signed, why did you have it signed?

A To have it signed to give it to Mr. Burr.

Q Did you deliver it personally to him or did you mail it?

A I have no recollection at all. How do I know?

Q Did you give him plaintiff's exhibit 1 or did you mail plaintiff's exhibit 1?

A Which is plaintiff's exhibit 1?

Q The statement of transferee which you filled out.

A I don't know whether I mailed it, whether he picked it up, whether Mr. Gordon mailed it, whether I gave it to him. I don't remember those things.

Q You filled out plaintiff's exhibit 1, you testified to that, that is the statement of transferee?

A I said it looks like I filled it out because it looks like my handwriting.

THE COURT: But you are not sure?

THE WITNESS: I am sure.

Q If you filled out plaintiff's exhibit 1, are you telling us that somebody else filled out plaintiff's exhibit 2?

A No.

Q Then you filled it out, is that right?

A It is very possible.

Q I am asking you whether you did or didn't, not whether it is possible, anything is possible.

MR. DEVINE: I object. He is not only arguing with the witness, but he answered at least three different times.

THE COURT: That he doesn't know he filled it out?

MR. DEVINE: He said some of the writing looks like his.

THE COURT: This is cross examination. I

will permit it.

Q Now I am going to show you another document, plaintiff's exhibit 3, which isthe same as plaintiff's exhibit 2, except for one respect. I am going to ask you whether or not you also filled in plaintiff's exhibit 3, which is a duplicate -- which is almost a duplicate of plaintiff's exhibit 2?

A I have no idea. There is nothing here that really gives me a strong indication whether I did or not.

Q You testified you filled in plaintiff's exhibit 2 and it is the same as plaintiff's exhibit 3 except in one respect?

A No, I didn't say that. I said I didn't know whether I did.

Q Do you know why the 4500 share figure was left out of plaintiff's exhibit 3?

A I have no idea.

Q But it isn't there, is it?

A No, I don't see it.

THE COURT: Let me see 2 and 3, please.

Q Could there have been two originals of this document?

A Sure, why not.

Q Who made the copies? Didn't you make the copies

at your office after the originals were signed?

A I have no idea.

Q You don't recall making the copies?

A No, I don't.

Q When Mr. Gordon executed plaintiff's exhibits 1 and 2, did you have a discussion with him at the time he executed or just prior to the time he executed it, or did he just walk in and you said, "Sign it," and he signed it?

Was there a discussion?

A I can't remember what occurred.

Q Did Mr. Gordon say to you "Why do I have to sign it"?

A I doubt it.

Q Do you remember?

A Exactly what was said, no.

THE COURT: The substance, not exactly, of what was said on July 18, 1968.

Do you remember the substance of what was said between you and Mr. Gordon on that day?

A Exactly, no.

THE COURT: Not exactly, I am asking you if you could tell me the substance?

THE WITNESS: The subetance basically was that he had to sign these pepers, fill these things out and

look them over.

THE COURT: That is what you said to him?

THE WITNESS: Yes. I probably read some things to him and other things he read himself and he had to sign them in front of a Notary after he was aware what they were.

Q Think carefully, and I again remind you you are under oath, didn't you tell Mr. Gordon that all of the others in the group had signed it as well and had given it to you?

A No.

Q You did not, you are sure you did not say that to him?

A The only thing that could have occurred, if anybody did sign it, that I might have told him but I don't remember telling him that anybody signed it or sent in any money --

Q I am not talking about sending in money. The money wasn't sent in until August 22. I am talking about July 18.

Didn't Mr. Gordon say to you why I am signing this, and didn't you say to him, everybody has to sign it, it is a form?

A That could have been my answer.

THE COURT: I don't like this "could have been,"

"maybe" or "perhaps it was".

THE WITNESS: Wait a second.

THE COURT: You wait a second. I want a straight answer to a straight question.

Read the question and don't tell me it could have been, might have been, all that.

You understand me, don't you?

A THE WITNESS: Yes, but you don't understand me. The way he posed the question was, that could have been my answer but not referring to the other people, that that is a form, --

THE COURT: Put a question, please.

Q Didn't Mr. Gordon say to you, did the other people sign these forms and didn't you say "Yes"?

A No.

Q He did not ask you?

A No.

Q You did not say the other people signed this?

A No.

Q You are positive of this?

A To the best of my recollection.

Q Then you are not positive?

THE COURT: Now, wait. He says to the best of his recollection. That is as far as you go.

MR. LOEWINTHAN: I withdraw that.

Q When did you become a director in Elpac?

A Exactly, I don't remember. Sometime the second half of 1968.

Q Do you remember attending a meeting at the Beverly Hills Hotel with Graham Loving -- incidently, weren't you with the Lowndes, Loving firm at one time?

A No.

Q Do you recall attending a meeting as a director of Elpac at I think it was the Beverly Hills Hotel at which Graham Loving was present?

A We had many meetings at that hotel.

Q In the fall of 1968?

A Specifically?

Q You don't remember?

A No.

Q Was it your understanding that with the monies received from the proceeds of the sale that was supposed to be put together in June of 1968, that Mr. Burr was going to pay off bank loans?

MR. GEIST: I object, your Honor.

THE COURT: Read it back.

THE COURT: Read it back.

(The question was read.)

THE COURT: I will sustain it as to whether

or not it was his understanding.

Mr. Burr told you that with the proceeds he was going to pay off bank loans?

THE WITNESS: From the proceeds of the sale of his own stock?

THE COURT: Yes.

THE WITNESS: It had something to do with his stock -- bank. Exactly, I don't remember. I know he was under pressure from his bank.

Q Was he under pressure because he had guaran teed the Elpac loans?

A That, I don't know.

Q Did he ever tell you that he guaranteed the loans?

A Not that I can remember.

Q Why would he be under pressure? Do you know why he wohdd be under pressure?

A The best of my recollection was, he had his own loan at the bank and they had called him on his loan and I think he was forced to sell on that matter. That is what I remember, anyway.

Q Didn't you say that the monies from the proceeds of the sale of Mr. Burr's stock was to go to pay off Elpac's loans?

A No, I didn't say that. I had no idea what happened

to the money, or I don't remember any way.

Q Do you remember that Mr. Burr stated that he would obtain the consent of the Commissioner of Corporations of the State of California for the sale of his stock?

A I don't remember it, no.

Q Did you know that inorder for him to sell the stock, he would have had to obtain such consent?

A I probably was aware of it , yes, only because of the prior deal which the California Commissioner was mentioned so much by the lawyers that I assumed he would have to go through the same rigamarole.

Q On August 22, were you in Mr. Gordon's office, August 22, 1968?

A I can't tell you, I don't know.

THE COURT: I think we will stop here for the lunch recess. It is a quarter to one and we will recess until 2 p.m..

(Luncheon recess.)

(Afternoon session, 2 p.m.)

THE COURT: You were in the middle of your cross examination.

MR. LOEWINTHAN: Yes.

ARNOLD A. LORD, resumed

CROSS EXAMINATION
BY MR. LOEWINTHAN (Continued)

Q Let's go back to the meeting of July 18, 1968 at the offices of Phillips, Appel & Walden at the time that Mr. Gordon signed the statement of transferee, plaintiff's exhibit 1, and the letter to Mr. Burr, plaintiff's exhibit 2.

Did Mr. Steinberg execute the same type of documents?

A I have no idea.

Q Did you ask Mr. Steinberg to execute the documents?

A No. Mr. Steinberg and I had no connection to that. Stevie Greenberg bought Steinberg in on this situation.

Q I don't ask you that. I asked you whether or not you asked Mr. Steinberg to execute plaintiff's exhibit 1 and2?

A Not that I recall.

Q Did you ask anybody other than Mr. Gordon to execute it?

A Not that I can remember, no.

Q Is your answer "No."?

A Not that I can recall, right

Q Did you on July 18, 1968, know that Mr. Steinberg was no longer in the deal?

A I have no idea.

THE COURT: What date?

MR. LOEWINTHAN: July 18.

Q You have no idea, is that your testimony?

A That is right.

Q Did you know of anyone else who was in the deal other than Mr. Gordon, and when I say in the deal, I mean of those persons who were present at the meeting of June 1968?

A Who was in the deal?

Q Yes, who was in the deal other than Mr. Gordon?

This is on July 18, 1968.

A I was probably aware of Diebdd's interest --

Q Who was in the deal, in the deal of the persons who were present in June at Steinberg & Pokoik's office?

A No.

Q Did you read plaintiff's exhibit 1, statement of transferee at the time that you filled in the blanks?

A Yes.

Q I call your attention -- did you read plaintiff's exhibit 2 at the time that Mr. Gordon signed it and at the time that you filled in the blanks?

A May I see it?

Q Sure.

A Yes, I probably did.

Q Will you tell us why if you knew or didn't know that Steinberg was out of the deal, why you put in August 5, 1968 in the paragraph next to last on the second page which says "The closing of the transactions contemplated hereby shall take place at the offices of Steinberg & Pokik" --

MR. DEVINE: Objection.

THE COURT: Overruled.

Q -- "575 Madison Avenue, New York, New York," then you wrote in August 5, 1968.

Mr Lord, my question is why if Steinberg was not in the deal, did you make the closing at Steinberg & Pokoik's office?

A First of all --

Q Please answer my question.

THE COURT: Let him answer.

A First of all, I don't believe that I ever said I wrote in August 5, 1968 on this thing. I didn't remember whether or not I wrote anything on this document. There is nothing here that gives me an indication that I did. I recall the document, yes, but I don't know that I wrote it in or not and to the best of my recollection, I am telling you the truth.

Q I thought you just testified to the question before this that you did write in the blanks?

A I never said that.

THE COURT: Let me see it, please.

THE WITNESS: The other one I did, it looks like my handwriting. This one I don't know whether I did.

THE COURT: Let me see exhibit 1, please.

Look at exhibit 2, please, and the parts that are filled in in ink and tell me whether or not you can tell that is your handwriting?

THE WITNESS: As I said before, the 4500 does not look like my handwriting. The March 31, 1968 looks like it. The 21 does not. The 14 -- I can't really say, Idon't know. It could be and it couldn't be, I don't know.

THE COURT: All right.

Q But you do know that the deal, that the closing was to be at the offices of Steinberg & Pokoik on August 5, 1968, you knew that?

A I have no idea because I have no memory of that.

Q Didn't you testify that you read the document before Gordon signed it?

A That is right, I remember the document, but that doesn't mean I remember what I read from back five years ago.

Q How far from your office was Stuie Steinberg's office?

A Stuie Steinberg?

Q Yes. You were both working for Phillips, Appel & Walden?

A Five second. It was very close.

Q Fifty feet?

A Maybe.

Q Did you ask Mr. Steinberg whether or not his father-- did you ask Mr. Steinberg whether or not they would allow the closing to be held at Steinberg & Pokoik on August 5?

A I don't remember that.

Q You just put in a person's name that is printed in --

THE COURT: Just a minute, he didn't say he put that in.

MR. LOEWINTHAN: I didn't say that.

THE COURT: Yes, you did. His testimony is he has no memory of when or where the closing date was to take place. With respect to that document, certain parts may or may not be in his hand and other parts could or could not be.

Q Do you know who typed this letter?

A I have no idea.

Q Was it typed at Phillips, Appel & Walden's office?

A I believe not because I believe it was part of a package that Robert Burr sent me from California, so I believe it was done in California.

Q Is it your testimony then that Mr. Burr made the closing of the transaction at Steinberg and Pokoik's office?

A I have no idea.

THE COURT: Did you get that form from Mr. Burr?

THE WITNESS I believe so, yes. It was part of a whole package with financials and everything else that came to me, from either Burr or Burt Massing who was Burr's lawyer at the time.

Q Did it come in the mail to you personally or to Phillips, Appel & Walden then delivered to you?

A It had to come to me. Phillips,Appel had nothing to do with it.

THE COURT: Do you remember whether it was filled out when you received it, exhibit 2, or was it in blank?

THE WITNESS: I think I received these long before there were any actual investors.

THE COURT: So they were in blank?

THE WITNESS: I believe so.

THE COURT: If you received them long before

this transaction was undertaken, how could anyone put in a closing date?

THE WITNESS: I don't know. I can only assume some one wrote them in later.

Q How could somebody write in Steinberg & Pokoik if it was long before the transaction?

A I have no idea. I am telling you the truth. I don't remember.

Q We hope you are tell us the truth --

THE COURT: Stop that, there is no jury here.

Q Let's go to August 20 , 1968. Were you in California at that time?

A I don't know. I might have been. I was in California a lot.

Q Do you recall being in Mr. Burr's office when a telegram was sent to Mr. Gordon?

A I don't remember a telegram.

Q Weren't you present at an examination before trial in which I showed you the telegram?

A Yes.

Q Then how could you testify that you don't remember,

this is only about a week ago?

A That I remember, but you are asking about 1968 and my recollection at the examination and today, from 1968 up until you showed me that document, I didn't remember that document but I saw it and I know it exists.

Q Do you have any recollection of being in Mr. Burr's office when the telegram was dictated on August 28, 1968?

A I don't remember the telegram so how could I remember associating myself with a telegram that was sent at a time that I don't remember that the telegram was sent? I see the telegram, I remember seeing it now, recently when you examined me. I see it, but I don't remember it.

Q I show you plaintiff's exhibit 4.

A Okay.

Q I ask you to read it, not out loud, to yourself, just read it.

A Okay.

Q Does that refresh your recollection of being in Mr. Burr's office when that was dictated or sent by wire to Mr. Gordon?

A No, not now, not at the examination. I don't really remember it.

Q Do you recall the day on August 21 receiving a telephone call from Mr. Gordon and being in Mr. Burr's office

when that telephone call came in?

A No. It might have happened but I don't remember it.

Q Do you remember a telephone conversation, a three way telephone conversation between yourself, Mr. Burr and Mr. Gordon?

A No. I have no recollection of these things.

Q Do you recall being in Mr. Gordon's office on August 22, 1968 in New York with Mr. Burr?

A I don't recall that, either, except I was told that I was there.

THE COURT: Who told you?

THE WITNESS: Mr. Burr told me.

Q Who told you?

THE COURT: Mr. Burr.

Q When did he tell you that?

A When I talked to him yesterday and today. He said we were there and I said I don't remember.

Q Do you remember initialing that telegram?

A No, I don't remember being there, how can I remember initialing it.

Q You are sure you don't remember initialing it?

A Yes.

THE COURT: Are those your initials?

THE WITNESS: He showed me this at the examination and this is what I told him then and I will repeat it now. The top initial over here, this is the way I do initial and it looks like my initial.

This is not the way I initial and this is not the way I sign my signature and I am not saying that it couldn't be me, but that is not the way I do it and I even went back to 1968 to see the way I signed my checks and I didn't sign my checks that way, either. It slants to the left and I do sharp to the right.

Q Do you see at the bottom of the telegram where it says "Amended 8-22-68" then "By" then two signatures, Arnold A. Lord and R.L. Burr?

A Right.

Q You see that?

A Yes.

Q Who wrote that into the telegram?

A I have no idea.

Q Did you read the telegram in Mr. Gordon's office on August 22?

A I have no memory of that so how can I tell you whether I did.

Q Did you know on August 22, 1968, whether or not Elpac at a meeting held Wednesday August 7, 1968, had

approved that the securities were to be registered on a best efforts registration?

A I have no memory of that.

MR. LOEWINTHAN: I ask Elpac to produce the board of director's meeting of August 7, 1968.

MR. GEIST: Your Honor, we do not have the August 7, 1968 meeting. Subsequent to the transactions alluded to , ther was a Chapter 11 of Elpac, several years later and they are still trying to reconstruct many of the minutes of the meetings.

THE COURT: Go ahead.

MR. LOEWINTHAN: Is counsel saying they do not have it at this time?

MR. GEIST: I do not have it at this time.

THE COURT: Have you made any effort to get it?

MR. GEIST: Yes. As I say, it is kind of difficult because a lot of things we had wanted --

THE COURT: Tell me please for the record what effort you made to get it?

MR. GEIST: I spoke to counsel in California, counsel for the company.. Some papers were being sent. As a matter of fact, your Honor, if they are there, they may have even come in.

The company had also moved their plant from California to Houston. If they came in, I will be more than happy to supply them to the Court and will so undertake to do, if in fact they do come.

THE COURT: All right, go ahead.

Q I don't know whether I asked you this before, but if I did, would you please answer it again.

Did Mr. Burr obtain permission to your knowledge from the California State Commission before the sale of the stock on August 22, 1968?

A I have no idea.

Q Did you know thatit was unlawful to sell the stock if he did not receive permission?

A I would only sumise so because of, again, I was aware of the California's Commissioner's strength and the kind of things they required and because of the prior deal, this was a lot of talk how hard they were as a State but I don't know specifically the law and I didn't know it then.

Q On August 22, 1968, did you ask Mr. Burr whether or not he had received permission?

A I have no idea.

Q You didn't? I didn't hear you.

A I have no idea.

Q You have no idea whether you asked him?

A Right.

THE COURT: Did it ever come to you: attention that plaintiff had caused $45,000 to be wired to Burr?

THE WITNESS: What do you mean, that I sent it by wire?

THE COURT: Yes.

THE WITNESS: I don't remember. I probably knew of it then.

THE COURT: Do you have any recollection as you sit in the witness stand now?

THE WITNESS: No.

THE COURT: You don't remember whether it ever came to your attention that plaintiff caused or sent by wire $45,000 to Burr?

THE WITNESS: No, I don't remember.

Q After August 22, 1968, did you ever speak to Mr. Gordon, either by telephone or face to face?

A I don't know. I may have.

Q You don't remember?

A All I can tell you is what I really remember and I don't remember, I might have.

Q Didn't Mr. Mann tell you that Mr. Gordon was trying to get in touch with you?

A That I don't remember at all.

Q Maybe you remember this.

Was Mr. James your partner?

A Partner?

Q Yes., partner.

A No.

Q Didn't you go on deals together with him?

A We did joint things, yes.

Q Weren't you in the same office with him?

A Yes.

Q After you left, what happened to your accounts?

A Mr. James took care of them.

Q Are you telling the Court that you never went back into that office to find out whether or not those accounts were being handled?

MR. DEVINE: Objection, he never said that.

THE COURT: Overruled.

MR. LOEWINTHAN: I didn't say he did.

A Repeat that, please.

(The question was read.)

A I never said that.

Q Did you go back into the office from time to time?

A Sure. I visited George from time to time. We were friendly.

Q Didn't you go back to find out about what business

was being done with your accounts? Weren't you interested?

A Well, not really, and I knew from conversations with George what was happening, because we were friendly, we spoke all the time and we still do.

Q Weren't you receiving an interest on anything that was sold at that time?

A Absolutely not.

Q When was the next time you spoke to Mr. Mann after August 22, would you remember that, after Mr. Gordon paid his money?

A I can't tell you exactly. I might have been speaking to Mr. Mann every single day throughout that whole year.

Q Did Mr. Mann ever mention to you the fact that Mr. Gordon had discovered that certain of the people who were at the meeting on June of 1968 had not gone into that deal

A I don't remember that at all.

Q You don't remember Mr. Mann telling you that?

A No.

MR. DEVINE: Your Honor, I will object to this line. It was Mr. Loewinthan who objected to the conversations between Mr. Mann and Mr. Bord on our direct examination.

THE COURT: Overruled.

Q Did Mr. Mann ever tell you to call Mr. Gordon?

A He might have.

Q Did you call him?

A Yes, if he told me to call him I might have called him.

THE COURT: Do you remember it?

THE WITNESS: No, I didn't remember how Mr. and I linked up, whether I called him or he called me. I knew that Howie was kind of the go between. He brought Mr. Gordon to my attention. I didn't know Mr. Gordon at all. He was his CPA.

Q I am talking about the time after Mr. Gordon paid his money, specifically sometime in March or April of 1969?

A 1969, no, I was no longer around then.

Q Did you see Mr. Mann from timeto time?

A Yes.

Q Did Mr. Mann ever tell you to call Mr. Gordon during that period?

A I don't remember, but it is certainly possible.

Q Did you speak to Mr. Gordon after March of 1969?

A I have no idea.

MR. LOEWENTHAL: No further questions, your Honor.

THE COURT: Anybody else?

MR. DEVINE: May I ask a few brief questions?

THE COURT: Yes, but before you do; Mr. Lord, I would like you to tell me with respect to this transaction what you clearly remember, is that clear, not what you surmise or whatever; tell me the facts one by one that you clearly remember.

THE WITNESS: I remember that Howie Mann told me that his accountant was interested basically because his accountant learned of it from Howie. Whether they were figuring --

THE COURT: Stop that. That is what you remember.

THE WITNESS: At the time I had a conversation with Mr. Gordon in which there was no stock available because the first placement was completely full.

Shortly after that Burr needed to sell stock and informed myself of it and Howie probably knew of it too because --

THE COURT: Don't tell us what he probably knew. All I am trying to find out is what you actually remember.

THE WITNESS: Yes, but as I am talking --

THE COURT: Just tell me what you actually remember.

THE WITNESS: Then I spoke to Mr. Gordon

again about his interest in buying the stock and told him about Mr. Burr's stock available.

Then after that there was a meeting in Mr. Steinber's office which was arranged I believe by Mr. Greenberg and Mr. Steinberg at which Mr. Gordon attended, I atended and in which the people that were interested in the stock listened to what was said.

THE COURT: You remember Steinberg and Adlman?

THE WITNESS: I am not sure about Adlman.

THE COURT: Go ahead.

THE WITNESS: I remember at that meeting some of the people had financial statements on their lap. That is all I remember. I don't remember exactly what the questions were.

I remember Mr. Gordon being in my office and my recollection was refreshed when I saw Barry Klein's signature and I recalled that he had come in and signed these papers, et cetera.

That is really about it in terms of sound real memory on any of these things.

THE COURT: All right.

MR. GEIST: Your Honor, I have had an opportunity to call my office. The notice to produce of Mr. Gordon states, and I think that is what caused part of

the problem, it states " Original of corporate minutes and or resolution of Elpac or other written memorandum granting defendant Robert L. Burr permission to consummate the sale of his shares of stock in the defendant Elpac in August 1968"

I have just called my partner. Some papers were there and I didn't want to let the Court think -- There was certainly no intention -- however, the minutes I will in a sense object to the minutes though your Honor may see them, because the notice calls for the corporate minutes or resolution or other written memoranda granting defendant Burr to consummate permission for the sale of his stock and I submit the minutes of August 7 or thereabouts, there are no such minutes or resolution.

THE COURT: If there are none, you can't produce them. That is an answer.

REDIRECT EXAMINATION
BY MR. DEVINE:

Q Did you receive any compensation from Mr. Burr as a result of the Elpac transaction between Mr. Burr and Mr. Gordon?

A None whatsoever.

Q The $3,677 which was discussed earlier had nothing to do with Elpac; is that correct?

A That is correct.

Q Did you ever hear Mr. Burr make any of the

representations which I read to you this morning from the compaint? Did you ever hear Mr. Burr make any of those statements?

A No, I never heard any of those statements.

Q At some point in time, did you learn that Mr. Gordon had transmitted $45,000 to Mr. Burr for Elpac stock?

A Yes.

Q Did you learn that at some point?

A Yes.

Q Can you recall for the Court when you learned it?

A When, no. I don't remember even who I first learned it from. Probably Bob Burr.

Q One last question.

During March of 1969 or the months shortly preceeding that, shortly following that March of 1969, did you intentionally avoid Mr. Gordon?

A No. I could be found.

Q That is not responsive.

Did you intentionally avoid him?

A No.

MR. DEVINE: That is all.

THE COURT: Anybody else?

MR. LIPSITZ: No, your Honor.

RECROSS EXAMINATION
XXXXXX BY MR. LOEWINTHAN:

Q Did you testify that you knew Mr. Burr's signature on this telegram, plaintiff's exhibit 4?

A Did I know it?

Q Do you know Mr. Burr's signature?

A It looks like it, yes.

Q Did you testify that you learned that Mr. Gordon had paid his money from Mr. Burr?

A I said I wasn't positive, but I imagine so. I learned about it. That I have a clear memory of.

Q You knew on August 22 that he paid the money because you were in his office?

THE COURT: In whose office?

MR. LOEWINTHAN: In Mr. Gordon's office on the 22nd.

THE COURT: Is that the fact?

A I don't remember the meeting in the office but if I was there in fact, I would have to know whether he paid by then.

THE COURT: Do you remember any occasion on which Mr. Gordon's office with Mr. Burr during which a discussion ensued in which Mr. Gordon said that the money had been wired?

THE WITNESS: I don't remember the meeting,

your Honor. All I can tell you is Bob Burr did tell me that we were at that place --

THE COURT: I understand that but you don't remember any meeting between you, Mr. Gordon and Mr. Burr where this was discussed?

THE WITNESS: No.

MR. LOEWINTHAN: No further questions.

THE COURT: Anybody?

You may step down.

(Witness excused.)

MR. DEVINE: The defense in behalf of Arnold Lord rests.

MR. LIPSITZ: Phillips, Appel & Walden rests.

MR. GEIST: Defendant Elpac rests.

THE COURT: All defendants rest, is that right?

Is there any rebuttal?

MR. LOEWINTHAN: No, your Honor. I would like to make a motion at this time.

THE COURT: Go ahead.

MR. LOEWINTHAN: I would like to move at this time for a rescission of the sale of the 4500 shares to Mr. Gordon on the ground that the sale was unlawful.

The plaintiff's exhibit 6, the stock certificate specifically says that the sale or transfer of this security

or receipt of any consideration therefore without the prior written consent of the Commissioner of Corporations of the State of California naming both transferor and transferee is unlawful and punishible by fine or imprisonment or both and I submit, your Honor, we have documentation in the from of exhibit 7 that the consent of the Commission was not obtained on August 26 at the time when Mr. Gordon bought the stock.

THE COURT: What is in the record to show that the Commissioner of Corporations in California had not approved it by the time the stock was delivered to your client, what is in the record on that?

MR. LOEWINTHAN: By the time the stock was delivered?

THE COURT: Yes.

MR. LOEWINTHAN: The stock had been purchased.

THE COURT: The stock had been paid for. At the time it was actually transferred to your client or issued through the transfer afent presumable to your client, what is there in the record to show at that time that the Commissioner of Corporations had not approved it?

MR. LOEWINTHAN: It is not a question of transfer. The ledgend says sale or transfer and I submit the sale took place on August 22.

THE COURT: Perhaps.

All right, you made your motion. Decision reserved.

Anything else?

MR. DEVINE: Defendant Lord would like to renew his motion to dismiss. I would ask your Honor entertain post trial memorandum.

THE COURT: I shall.

Your motion is denied. I shall fix a schedule for the filing of memorandum.

MR. GEIST: Defendant Elpac --

THE COURT: I take it all defense counsel renew their motions made at the end of defendants' case and the ruling is the same.

So far as findings of fact and conclusions of law and legal memorandum in support of your positions, how much time do you gentleman want?

By the way do you intend to key your findings to the minutes?

Are you people ordering the minutes of this trial?

MR. DEVINE: I hadn't crossed that bridge.

THE COURT: You better please do.

MR. DEVINE: May we have a short time to

consider that preliminary matter?

THE COURT: Yes.

Do you want to consult among yourselves whether you want to order the minutes?

MR. DEVINE: May we just have a brief caucus?

THE COURT: Yes. Talk among yourselves and I will just wait.

(Pause)

MR. DEVINE: Your Honor, I think it is our feeling of the defense group we would like to have the minutes. We will prefer if it is consistent with your calendar to do it on a aregular basis bather than a daily basis.

MR. LOEWINTHAN: I would like that too, your Honor.

THE COURT: I don't see any need for immediateness about this.

All right. You will get the minutes within three weeks.

How much time after that do you want to prepare the materials?

MR. DEVINE: Whatever your Honor thinks reasonable.

MR. LOEWINTHAN: I will go along with that.

THE COURT: What is comfortable?

MR. DEVINE: A couple of weeks would be comfortable.

THE COURT: Why don't we say three weeks after you get the minutes. It will probably be six weeks based on the fact it will take you three weeks to get the minutes and three weeks from then.

Why don't we talk about May 25.

I would really like some help both as to the facts and the law.

Thank you gentlemen.

* * *

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PLAINTIFF'S EXHIBIT 1 - STATEMENT OF TRANSFEREE Plaintiff Exhibit I (cd)
J. my. 6.
1/17/73

## STATEMENT OF TRANSFEREE

The undersigned intends to purchase 4500 shares of common stock of ELPAC, Inc., from Robert L. Burr at a price of $12,00 and makes the following statements:

(1) I have received from the issuer and/or the transferor a recent financial statement of the issuer and such additional information with respect to the issuer as I have deemed necessary to make an independent evaluation of the business prospects of the issuer and the fairness of the investment. (✓) Yes ( ) No

(2) (a) I am a director of issuer. ( ) Yes (✓) No
(b) I am an officer of issuer. ( ) Yes (✓) No

(3) I am a parent, child, grandchild or spouse of one or more of the officers or directors of issuer, or trustee or custodian for the account of such a person.
( ) Yes (✓) No

(4) (a) I shall actively participate in the operation of issuer's business to the extent of my full time. ( ) Yes (✓) No

(b) I shall actively participate in the operation of issuer's business and devote a substantial portion of my time thereto, with an opportunity as an officer or director, to be fully aware, of all of the issuer's affairs and in a position to exercise business discretion. ( ) Yes (✓) No

(c) I will be compensated for such services.
( ) Yes (✓) No

(5) (a) The names of officers or directors of issuer whom I have known, the length of time I have known them and the nature of my prior business dealings with any of them are set forth below:

NONE

(b) My recent business experience is summarized briefly below:

Public Accountant

(c) My prior investment experience in businesses of a similar size and nature of ELPAC, Inc., is summarized below:

Various Investments of All Kinds at different times over past 15 years.

(d) My proposed investment in ELPAC, Inc., ( ) is (✓) is not in excess of 10% of my net worth; my proposed investment (✓) is ( ) is not in excess of 10% of my annual income.

(e) I have received advice from the following professional adviser or advisers in connection with my proposed investment in ELPAC, Inc.: (State "none" if none.)

Arnold A. Lord
Lord 469 Fave Nyc
10018

(f) I have agreed to pay the following commission in connection with this transaction: (State "none" if none.)

None

I understand that I am making these statements for the purposes of evaluation by the Division of Corporations of the State of California and that the Division may rely on these statements in lieu of independent examination in determining whether or not the transfer of the securities of ELPAC, Inc., to me is fair, just and equitable. 342a

Date: 7/18/68

Signature

IRVING GORDON
Name (Please print or type)

64-08 BOLSEN CRESCENT
Address

REGO PARK, N.Y.

STATE OF New York )
COUNTY OF New York )

and says: Irving Gordon, being first duly sworn, deposes

That he has read the foregoing Statement of Transferee and knows the contents thereof, and that the statements and information included therein are true and correct.

Subscribed and sworn to before me this 18th day of July, 1968.

(SEAL)

Notary Public in and for said State and County
My Commission Expires 3/30/70.

LAWRENCE M. KLEIN
NOTARY PUBLIC, State of New York

PLAINTIFF'S EXHIBIT 2 - LETTER TO ROBERT L. BURR FROM IRVING GORDON

PLAINTIFF'S

343a

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 11 1973

Mr. Robert L. Burr
c/o Elpac, Inc.
18651 Von Karman Avenue
Irvine, California 92664

Dear Sir:

The undersigned hereby agrees to purchase from you 4500 shares of Common Stock (the "Shares") of Elpac, Inc. (the "Company") at $12 per share.

In order to induce the undersigned to purchase the Shares you have made the following representations and warranties to the undersigned:

(a) that the Shares are owned by you, free and clear of all liens, encumbrances or charges whatsoever;

(b) that the Company is a corporation duly organized, validly existing and in good standing under the laws of the State of California;

(c) that the financial statements of the Company as of MAR 31, 1967 heretofore delivered to the undersigned are true and correct and properly set forth the financial condition of the Company as of such date;

(d) that there has been no material adverse change in the business operations or financial condition of the Company since the date of the financial statements set forth in the immediately preceding paragraph;

(e) that you do not know of any fact or state of facts which could have a material adverse effect on the Company, its business or operations; and

(f) that no consent of any person or government agency is required as a condition precedent to the sale of the Shares, except the consent of the Commission of Corporations of the State of California.

The undersigned hereby acknowledges and agrees that the Shares are being acquired by the undersigned for his sole account for investment, and not with a view towards the resale or public distribution thereof, and that such Shares will not be sold or transferred except in accordance with the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder; and the undersigned further agrees that a

Deft's Ex. E For Ident
4/5 1973 Richard B. Greenspan

legend to the foregoing effect may be imprinted on any certificate for Shares delivered to him pursuant to this agreement.

The undersigned agrees to execute such documents as may be reasonably required in order to obtain the approval of the Commissioner of Corporations of the State of California to the transactions contemplated hereby; and the consent of such Commissioner is a condition precedent to the obligations of you and the undersigned. In the event that such consent is not obtained within 21 days from the date hereof, the undersigned shall have the right to terminate this agreement and its obligations hereunder by sending you written notice to the address first above written.

You agree to cause the Company to deliver to the undersigned an agreement or statement in form and substance satisfactory to the undersigned agreeing to include the Shares in the next registration statement filed by the Company with the Securities and Exchange Commission. The receipt by the undersigned of such agreement or statement within 14 days from the date hereof shall be a condition precedent to the obligations of the undersigned hereunder.

The closing of the transactions contemplated hereby shall take place at the offices of Steinberg & Pokoik, 575 Madison Avenue, New York, N. Y. on AUG 5, 1968. At such time, the undersigned will make payment for the Shares against the delivery thereof.

If the foregoing correctly sets forth your understanding, will you kindly acknowledge agreement to the terms and conditions set forth herein by signing at the place indicated and returning the same to the undersigned.

Very truly yours,

AGREED AND ACCEPTED:

Robert L. Burr

PLAINTIFF'S 345a

PLAINTIFF'S EXHIBIT 3.:- LETTER TO ROBERT L. BURR FROM IRVING GORDON

EXHIBIT
U. S. DIST. COURT
S. D. N. Y.
APR 11 1973

3+4

Mr. Robert L. Burr
c/o Elpac, Inc.
18651 Von Karman Avenue
Irvine, California 92664

Dear Sir:

The undersigned hereby agrees to purchase from you shares of Common Stock (the "Shares") of Elpac, Inc. (the "Company") at $12 per share.

In order to induce the undersigned to purchase the Shares you have made the following representations and warranties to the undersigned:

(a) that the Shares are owned by you, free and clear of all liens, encumbrances or charges whatsoever;

(b) that the Company is a corporation duly organized, validly existing and in good standing under the laws of the State of California;

(c) that the financial statements of the Company as of March 31, 1967 heretofore delivered to the undersigned are true and correct and properly set forth the financial condition of the Company as of such date;

(d) that there has been no material adverse change in the business operations or financial condition of the Company since the date of the financial statements set forth in the immediately preceding paragraph;

(e) that you do not know of any fact or state of facts which could have a material adverse effect on the Company, its business or operations; and

(f) that no consent of any person or government agency is required as a condition precedent to the sale of the Shares, except the consent of the Commission of Corporations of the State of California.

The undersigned hereby acknowledges and agrees that the Shares are being acquired by the undersigned for his sole account for investment, and not with a view towards the resale or public distribution thereof, and that such Shares will not be sold or transferred except in accordance with the Securities Act of 1933, as amended, and the rules and regulations promulgated thereunder; and the undersigned further agrees that a

Deft's Ex. D For Ident

legend to the foregoing effect may be imprinted on any certificate for Shares delivered to him pursuant to this agreement.

The undersigned agrees to execute such documents as may be reasonably required in order to obtain the approval of the Commissioner of Corporations of the State of California to the transactions contemplated hereby; and the consent of such Commissioner is a condition precedent to the obligations of you and the undersigned. In the event that such consent is not obtained within 21 days from the date hereof, the undersigned shall have the right to terminate this agreement and its obligations hereunder by sending you written notice to the address first above written.

You agree to cause the Company to deliver to the undersigned an agreement or statement in form and substance satisfactory to the undersigned agreeing to include the Shares in the next registration statement filed by the Company with the Securities and Exchange Commission. The receipt by the undersigned of such agreement or statement within 14 days from the date hereof shall be a condition precedent to the obligations of the undersigned hereunder.

The closing of the transactions contemplated hereby shall take place at the offices of Steinberg & Pokoik, 575 Madison Avenue, New York, N. Y. on Aug 5, 1968. At such time, the undersigned will make payment for the Shares against the delivery thereof.

If the foregoing correctly sets forth your understanding, will you kindly acknowledge agreement to the terms and conditions set forth herein by signing at the place indicated and returning the same to the undersigned.

Very truly yours,

AGREED AND ACCEPTED:

Robert L. Burr

PLAINTIFF'S EXHIBIT 4 - TELEGRAM FROM BURR TO IRVING GORDON

346a

CLASS OF SERVICE
This is a fast message unless its deferred character is indicated by the proper symbol.

# WESTERN UNION
## TELEGRAM

1968 AUG 2 PM 10 26

DL=Day Letter
NL=Night Letter
LT=International Letter Telegram

The filing time shown in the date line on domestic telegrams is LOCAL TIME at point of origin. Time of receipt is LOCAL TIME at point of destination

UDA462 (23)(37)LB600

L NRA230 PDO NEWPORT BEACH CALIF 20 530P PDT

MR. IRVING GORDON

1156 6 AVE NYK

I, ROBERT BURR, AGREE TO SELL YOU 4,500 SHARES OF MY PERSONAL COMMON STOCK IN ELPAC, INC., AT $10 PER SHARE PROVIDED I RECEIVE $45,000 ON MY ACCOUNT AT THE NEWPORT NATIONAL BANK, AIRPORT BRANCH, NEWPORT BEACH, ON 8-27-68 BY 1:00 P.M. CALIFORNIA TIME.

THE ABOVE-MENTIONED SECURITIES ARE TO BE REGISTERED ON A BEST-EFFORT REGISTRATION AS APPROVED BY THE BOARD OF DIRECTORS OF ELPAC IN A MEETING HELD WED., 8-7-68; PENDING CURRENT CALIFORNIA COMMISSIONER APPROVAL

ROBERT L BURR ELPAC INC

Amended 8/22/68 hjg.

,500 $10 $45,000 8-27-68 1:00 P M 8-7-68

01(RB-68)

WESTERN UNION
TELEGRAM

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 11 1973

PLAINTIFF'S

On any occasion it's wise to wire

PLAINTIFF'S EXHIBIT 5 - LETTER DATED MARCH 6, 1969 FROM DEPARTMENT OF LAW TO IRVING GORDON AND ENCLOSURE



STATE OF NEW YORK

# DEPARTMENT OF LAW

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

STATE OFFICE BUILDING
80 CENTRE STREET
NEW YORK 13, N. Y.
TELEPHONE: 488-3333

MEYER H. MENCHER
ASSISTANT ATTORNEY GENERAL
IN CHARGE BUREAU OF SECURITIES

March 6, 1969

RE: Elpac Corp. and Robert Burr

Mr. Irving Gordon
64-08 Boelsen Crescent
Rego Park, New York

Dear Mr. Gordon:

Enclosed herewith is a photostatic copy of a letter dated March 4, 1969, received from Bertram K. Massing, Esq., which is self-explanatory.

It is suggested that you immediately contact the transfer agent mentioned therein and Bertram K. Massing, Esq., in order to inform them of your correct address so that the delivery of the stock could be expedited. As soon as you receive delivery, please advise the undersigned.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General
By

Henry H. Smith

HENRY H. SMITH
Assistant Attorney General

HHS:jms
Enc.

PLAINTIFF'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 11 1973
5

3/8/69
Telegram
16 advs

LAW OFFICES
ERVIN, COHEN & JESSUP
9171 WILSHIRE BOULEVARD
BEVERLY HILLS, CALIFORNIA 90210

AREA CODE 213
TELEPHONES
278-7833 AND 273-6333

CABLE: JOLED

N W. ERVIN
NARD COHEN
DGAR JESSUP, JR.
VIN S. SPEARS
TRAM K. MASSING
ACE N. FREEDMAN
VIN H. LEWIS
AN BROWNE
PHEN E. SOLOMON
B. EHRNSTEIN



March 4, 1969

REF. OUR FILE NO.

1368-50-6

State of New York
Department of Law
State Office Building
80 Centre Street
New York, New York 10013

Attn: Henry H. Smith,
Assistant Attorney General

Re: ELPAC CORPORATION
and ROBERT BURR

Gentlemen:

In response to your letter dated February 25, 1969, this is to inform you that the transfer agent of Elpac, Inc. is in the process of completing the transfer and is expected to mail Mr. Gordon's certificate on or before Friday, March 7, 1969.

The only address we have for Mr. Gordon is "Rego Park, New York" and the transfer agent has been instructed to mail the certificates to that address.

By way of brief background, Mr. Burr delivered a certificate for 4,500 shares to a broker whom he believed to be acting on behalf of Mr. Gordon. The certificate was returned to this office on January 13, 1969, from the broker, and as soon as I became aware that the certificate should be transferred to Mr. Gordon, I delivered it to the transfer agent, the Bank of California, N.A. on or about January 31, 1968. Any delay since January 31, 1968 is attributable to the workload of the transfer agent, and your February 25 letter was my first indication that the certificate had not been delivered. I am disappointed in the transfer agent's performance, to say the least.

Thank you for your cordial letter.

Very truly yours,

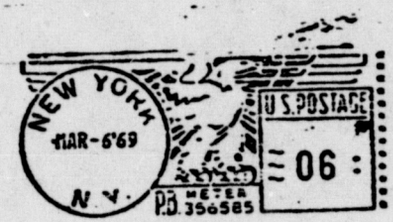
Bertram K. Massing

BKM:mc

349a

NEW YORK STATE
ATTORNEY GENERAL
LOUIS J. LEFKOWITZ
80 CENTRE STREET
NEW YORK, N. Y. 10013

An Informed Consumer
— Is The
Best Protection
Against Fraud




Mr. Irving Gordon
64-08 Boelsen Crescent
Rego Park, New York

INCORPORATED UNDER THE LAWS
OF THE STATE OF CALIFORNIA

LDS-12

4,500

"THE SHARES REPRESENTED BY THIS CERTIFICATE HAVE NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933 AND MAY NOT BE SOLD, TRANSFERRED, PLEDGED, HYPOTHECATED OR OTHERWISE DISPOSED OF UNLESS IN THE OPINION OF COUNSEL SATISFACTORY TO ELPAC, INC. THE DISPOSITION QUALIFIES FOR AN EXEMPTION FROM OR EXCEPTION TO THE REGISTRATION PROVISIONS THEREOF."

# ELPAC, INC.

"SALE OR TRANSFER OF THIS SECURITY OR RECEIPT OF ANY CONSIDERATION THEREFOR WITHOUT THE PRIOR WRITTEN CONSENT OF THE COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA NAMING BOTH TRANSFEROR AND TRANSFEREE IS UNLAWFUL AND IS PUNISHABLE BY FINE OR IMPRISONMENT OR BOTH."

THIS CERTIFIES THAT -IRVING GORDON- is the record holder of

-FOUR THOUSAND FIVE HUNDRED-

COMMON SHARES. BEING THE SHARES REPRESENTED HEREBY OF THE PAR VALUE OF ONE DOLLAR EACH OF ELPAC, INC., hereinafter designated "the Corporation," transferable on the share register of the Corporation upon surrender of this Certificate, properly endorsed. By the acceptance of this Certificate the holder hereof assents to and agrees to be bound by all the provisions of the Articles of Incorporation and the Bylaws and all amendments thereto. This certificate is not valid until countersigned by the Transfer Agent and registered by the Registrar.

WITNESS the seal of the Corporation and the signatures of its duly authorized officers.

Dated: MARCH 11, 1969

REGISTERED: UNITED CALIFORNIA BANK (LOS ANGELES) REGISTRAR. BY AUTHORIZED OFFICER

COUNTERSIGNED: THE BANK OF CALIFORNIA, NATIONAL ASSOCIATION. (LOS ANGELES) TRANSFER AGENT BY AUTHORIZED OFFICER.

ELPAC, INC. INCORPORATED FEB. 1, 1969 CALIFORNIA

Dale F. Rodnick
SECRETARY

Robert D. Gunn
PRESIDENT

© JOHNSTON-MALLINCKRODT COMPANY

PLAINTIFF'S EXHIBIT 6 - ELPAC STOCK CERTIFICATE

FOR VALUE RECEIVED_____ hereby sell, assign and transfer unto

_____

_____ Shares

represented by the within Certificate, and do hereby irrevocably constitute and appoint

_____ Attorney,

to transfer the said shares on the share register of the within named Corporation with full power of substitution in the premises.

Dated_____

_____

In Presence of:

_____

NOTICE: The signature to this assignment must correspond with the name as written upon the face of the Certificate in every particular without alteration or enlargement or any change whatever.

"SALE OR TRANSFER OF THIS SECURITY OR RECEIPT OF ANY CONSIDERATION THEREFOR WITHOUT THE PRIOR WRITTEN CONSENT OF THE COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA NAMING BOTH TRANSFEROR AND TRANSFEREE IS UNLAWFUL AND IS PUNISHABLE BY FINE OR IMPRISONMENT OR BOTH."

THIS SPACE MUST NOT BE COVERED IN ANY WAY

EXHIBIT "6" (Back)

352a

1. TRANSMITTAL

THE BANK OF CALIFORNIA
National Association

SECURITIES TRANSMITTAL/RECEIPT

ALWAYS REFER TO RECEIPT
No. 1-226794

☐ REGULAR TRANSFER ☐ MAIL SECURITIES
☐ LEGAL TRANSFER ☐ HOLD FOR PICK-UP
☐ BOND TRANSFER

TRANSFER MADE IN ACCORDANCE WITH YOUR INSTRUCTIONS OF Jan 28, 1969

DATE RECEIVED Jan 30, 1969

| CORPORATION | CLASS/ISSUE | SHARES/PAR VALUE |
|---|---|---|
| ELPAC, INC<br><br>LD842 @ 4,500 n/o Irving Gordon | COMMON | 4,500 |

Mr. Irving Gordon
Rego Park, ~~California~~ New York
6408 Boelsen Crescent
Rego Park New York 11374

SECURITIES ENCLOSED IN THIS ENVELOPE HAVE BEEN INSURED UNDER OUR INSURED MAIL POLICY.

CORPORATE TRUST DIVISION

The Bank of California National Association as Transfer Agent and/or Trustee, reserves the right, in determining whether to make the transfer, to examine its records as to the status of said security, also to require further endorsement, if, on examination, the endorsements are considered to be insufficient; also to require compliance by the transferee with such legal prerequisites as in the opinion of the Bank may be necessary to the transfer.

ST-10235 (REV. 6-66) 4-68 - 75M

PLAINTIFF'S EXHIBIT
U.S. DIST. COURT
S.D. OF N.Y.
APR 11 1973

6-pt

PLAINTIFF'S PLAINTIFF'S EXHIBIT 7 - CALIFORNIA PERMIT AUTHORIZING SALE OF SECURITIES DEFENDANT'S 353

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 12 1973
Tuttle

EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 11 1973
A-12

BEFORE THE
DEPARTMENT OF CORPORATIONS
OF THE
STATE OF CALIFORNIA

In the matter of the application of

ELPAC, INC.

for a permit authorizing the sale and issuance of securities.

CONSENT TO TRANSFER

File No. 300 1314

I expressly consent to the transfer of certain securities of ELPAC, INC., to be effected in the following manner:

| | | | |
|---|---|---|---|
| From: | Robert L. Burr | Pledgor's interest in | 24,500 shares |
| | Bank of California,N.A. | Pledgee's interest in | 24,500 shares |
| To: | The Diebold Technology Venture Fund, Inc. | | 20,000 shares |
| | Irving Gordon | | 4,500 shares |

upon the condition that when said securities are transferred, the documents evidencing such securities shall bear upon their face and reverse sides a legend, clearly printed or stamped thereon in a color contrasting with all other color appearing on either side of the certificate and in capital letters of not less than ten-point type, reading as follows:

> "SALE OR TRANSFER OF THIS SECURITY, OR RECEIPT OF ANY CONSIDERATION THEREFOR, WITHOUT THE PRIOR WRITTEN CONSENT OF THE COMMISSIONER OF CORPORATIONS OF THE STATE OF CALIFORNIA, NAMING BOTH TRANSFEROR AND TRANSFEREE, IS UNLAWFUL AND IS PUNISHABLE BY FINE OR IMPRISONMENT, OR BOTH."

and provided that any documents surrendered on such transfer shall be immediately cancelled.

Dated: Los Angeles, California

OCTOBER 21 1968

ROBERT H. VOLK
Commissioner of Corporations

By I. F. Fields

IRVING F. FIELDS

PLAINTIFF'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 16 1973

PLAINTIFF'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 16 1973

21

ADVICE TO DEPOSITOR

**MANUFACTURERS HANOVER TRUST COMPANY**
CENTRAL COLLECTION DEPT.
NEW YORK, N. Y.

IF THIS TICKET BEARS OUR "PAID" STAMP, THE ITEM HAS BEEN COLLECTED AND CREDITED. IF THE ITEM IS NOT PAID WITHIN [illegible] DAYS, IT WILL BE RETURNED WITH OUR "UNPAID" STAMP AND THE ITEM WILL BE ATTACHED.

| TRACER DATE | DATE SENT | DATE OF ITEM | ENTRY DATE | PROTEST | TENOR OF DRAWER |
|---|---|---|---|---|---|
| | 11/8/68 | 11/4/68 | 11/8/68 | NES | CHECK |

PAYER: ROBERT L. BURR 258 -
U

PLACE OF PAYMENT

ACCOMPANYING DOCUMENTS ▶ CERTIFICATE | ORDER | RECEIPT | DEED | OTHER

BRANCH NO. | ACCOUNT NO.
022-2-48357

[illegible] 370136
[illegible] 257.80
[illegible] 257
[illegible] 11.29

NOV 15 1968

TO → A. A. BIRD

SPECIAL INSTRUCTIONS

3-68 30M 11-67

PLAINTIFF'S EXHIBIT
U. S. DIST. COURT
S. D. OF N. Y.
APR 16 1973

NOTICE OF APPEAL BY PLAINTIFF IRVING GORDON
(Filed May 24, 1974)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD, and PHILLIPS, APPEL & WALDEN, INC.

Defendants.

71 CIV. 1285

NOTICE OF APPEAL

----------X

Notice is hereby given that Irving Gordon, plaintiff in the above entitled action, appeals to the Court of Appeals for the Second Circuit from the Judgment entered in this action on December 12, 1973, and from each and every part thereof, and from the decision and order entered May 2, 1974 and from each and every part thereof.

Dated: New York, New York
May 21, 1974

Yours, etc.

LEONARD LOEWINTHAN
Attorney for Plaintiff
1 East 57th Street
New York, New York 10022

TO: Rogers & Cooper, Esqs.
Attorneys for Defendant Burr
60 East 42nd Street
New York, New York 10017

Butowsky, Schwenke & Devine, Esqs.
Attorneys for Defendant Lord
230 Park Avenue
New York, New York 10017

Balterman & Geist, Esqs.
Attorneys for Defendant Elpac, Inc.
10 East 40th Street
New York, New York 10016

Bressler, Meislin, Tauber & Lipsitz, Esqs.
Attorneys for Defendant Phillips, Appel & Walden, Inc.
90 Broad Street
New York, New York 10004

NOTICE OF CROSS-APPEAL BY DEFENDANT ARNOLD LORD
(Filed June 6, 1974)

Filed
U.S.D.C.
JUNE 10-74
SDNY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - - - - - - - x

IRVING GORDON, :

Plaintiff, : 71 Civ. 1285

-against- : NOTICE OF CROSS-APPEAL

ROBERT L. BURR, ELPAC,, INC., ARNOLD LORD, and PHILLIPS, APPEL & WALDEN, INC., :

- - - - - - - - - - - - - - - - - - - - - - x

NOTICE hereby is given that Arnold Lord, a defendant above named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from that portion of the judgment entered in this action December 12, 1973, which is based upon the statements in the decision of Hon. Arnold Bauman dated November 13, 1973, to the effect that defendant Arnold Lord violated the federal securities laws. No appeal is taken from the portion of the judgment which dismisses the complaint against defendant Arnold Lord.

This is a cross-appeal to the appeal noticed by plaintiff, by notice dated May 21, 1974.

BUTOWSKY, SCHWENKE & DEVINE

By Michael C. Devine
A member of the firm
Attorneys for defendant
Arnold Lord
230 Park Avenue
New York, New York 10017
(212) 725-5360

TO: LEONARD LOEWINTHAN
1 East 57th Street
New York, New York 10022

ROGERS & COOPER, ESQS.
60 East 42nd Street
New York, New York 10017

TO: BALTERMAN & GEIST, ESQS.
10 East 40th Street
New York, New York 10016

BRESSLER, MEISLIN, TAUBER & LIPSITZ, ESQS.
90 Broad Street
New York, New York 10004

NOTICE OF CROSS-APPEAL BY DEFENDANTS PHILIPS, APPEL & WALDEN, INC.
(Filed June 5, 1974)



UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

IRVING GORDON,

Plaintiff,

- against -

ROBERT L. BURR, ELPAC, INC., ARNOLD LORD, and PHILIPS, APPEL & WALDEN, INC. (sued herein as PHILLIPS, APPEL & WALDEN),

Defendants.

----------X

File No.: 71-Civ. 1285 A.B.

NOTICE OF CROSS-APPEAL

Notice is hereby given that Philips, Appel & Walden, Inc., one of the defendants above named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from so much and such part of the findings of fact and conclusions of law incorporated in the Opinion of the Court (per Bauman, D. J.), dated November 13, 1973 and filed November 14, 1973, upon which the final judgment was entered in this action on December 12, 1973, as found defendant Philips, Appel & Walden, Inc. liable as a "controlling person" under Section 20(a) of the Securities Exchange Act of 1934 and found plaintiff to have "in effect amended his complaint" at the trial and in his post-trial brief to allege that defendant Philips, Appel & Walden, Inc. was a "controlling person" under Section 20(a) of the Securities Exchange Act of 1934, and from such part only, and said defendant does not appeal from any other part of said judgment, or from the Decision and Order herein, entered on May 2, 1974, except as herein specifically

set forth.



Dated: New York, New York
June 4, 1974

BRESSLER, MEISLIN, TAUBER & LIPSITZ
Attorneys for Defendant, Philips,
Appel & Walden Inc.

By _____
A Member of the Firm

Office and P. O. Address
90 Broad Street
New York, New York 10004
212 425-9300

TO: LEONARD LOEWINTHAN, ESQ.
Attorney for Plaintiff
1 East 57th Street
New York, New York 10022

ROGERS & COOPER, ESQS.
Attorneys for Defendant,
Robert L. Burr
60 East 42nd Street
New York, New York 10017

BUTOWSKY, SCHWENKE & DIVINE, ESQS.
Attorneys for Defendant,
Arnold Lord
230 Park Avenue
New York, New York 10017

BALTERMAN & GEIST, ESQS.
Attorneys for Defendant,
Elpac, Inc.
10 East 40th Street
New York, New York 10016

A 202 Affidavit of Personal Service of Papers H LUTZ APPELLATE PRINTERS INC.

U.S. COURT OF APPEALS:SECOND CIRCUIT

Index No.

GORDON,

Appellant,

against

BURR, et al,

Appellees.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK ss.:

being duly sworn,

I, Victor Ortega,

deposes and says that deponent is not a party to the action, is over 18 years of age and resides at

1027 Avenue St. John, Bronx, New York

That on the 23rd day of July 1974 at *

deponent served the annexed Appellant's Appendix upon

*

the in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Attorney(s) herein,

Victor Ortega

Print name beneath signature

Sworn to before me, this 23rd day of July 19 74

VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, STATE OF NEW YORK
NO. 31 - 0418950
QUALIFIED IN NEW YORK COUNTY
COMMISSION EXPIRES MARCH 30, 1975

Robert T. Brin

* Bressler, Meislin, Tauber & Lipsitz-Attorneys for Appellee, Philips, Appel & Walden-90 Broad Street, New York.
Robers & Cooper-Attorneys for Appellee Burr-60 E. 42nd Street, New York.
Butowsky, Schwenkd & Divine-Attorneys for Appellee Lord-230 Park Ave., New York.
Balterman & Geist-Attorneys for Appellee Elpac, Inc.,-10 E. 40thSt., New York.